IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND MOTION TO ADVANCE

LEE A. ALBERT
Center on Social Welfare Policy and Law
401 West 117 Street
New York, New York 10027
280-4112

HENRY A. FREEDMAN
SYLVIA ANN LAW
ROBERT P. BORSODY
Of Counsel

INDEX

TABLE OF AUTHORITIES

Cases:

In the

Supreme Court of the United States

October Term, 1969

No. .....

Julia Rosado, Lydia Hernandez, Majorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Majorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

—against—

George K. Wyman, individually and in his capacity as Commissioner of Social Services for the State of New York, and the Department of Social Services for the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND MOTION TO ADVANCE

Petitioners pray for the issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, entered on July 16, 1969 (45aa) vacating preliminary and permanent injunctions and reversing summary judgment entered by District Judge Weinstein (Eastern District, New York) and affirming the dissolution of the three judge district court. The judgment of the Circuit Court Judges Lumbard and Hays, Judge Feinberg dissenting, reverses the District Court orders enjoining New York from severely reducing subsistence

grants to some 850 thousand needy children and their parents under the Aid to Dependent Children program.

Petitioners also pray that this Court note the urgency of the interests at stake along with the national importance of the federal issues herein presented and advance the schedule for briefing and argument. This Petition is accompanied by an Application for Stay pending review in this Court, submitted on August 1, 1969, to Mr. Justice Harlan, Circuit Justice, and referred by him on August 20, 1969, pursuant to Rule 50(b), to the entire Court.

Opinions Below

The opinion of the three-judge district court dismissing the constitutional claim, dissolving itself, and remanding the case to the single judge is not reported, and is set forth in "Appendix to Petition for Certiorari, Motion to Expedite, and Jurisdictional Statement", Nos. 1539 and 1540, O.T. 1968, submitted to this Court last term (10a).[1]

The opinion of the one-judge district court in support of the preliminary injunction is set forth at 14a. The District Court's preliminary injunction order is set forth at 64a. The *per curiam* order of the Court of Appeals staying the preliminary injunction, dated June 11, 1969, is set forth at 66a. The District Court's opinion in support of summary judgment is set forth at 39aa. The Court of Appeals opinion affirming the dissolution of the three-

[1] References to the aforementioned Appendix in Nos. 1539 and 1540, O.T. 1968, are designated ——a. That Appendix contains the opinions rendered prior to the District Court's Summary Judgment and Permanent Injunction and the Circuit Court's reversal below. The later opinions are contained in the Appendix to this Petition for Certiorari and references thereto are designated ——aa.

judge court, vacating the injunctions, and reversing the summary judgment is found at 45aa. The Court of Appeals denial of a stay of its mandate pending application to Mr. Justice Harlan is set forth at 89aa.

Jurisdiction

The judgment of the Second Circuit Court of Appeals affirming the dissolution of the three-judge court, vacating the preliminary and permanent injunctions and reversing the summary judgment was entered July 16, 1969. The Circuit Court on July 31, 1969 denied Petitioner's motion to stay its mandate pending application for certiorari to this Court. Jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1), 2101(c) & (f).

Questions Presented

In January, 1968, Congress ordered the states to adjust by July 1, 1969, their standard of need in the AFDC program to reflect fully changes in living costs since the time of last adjustment and to adjust proportionately any maximums then imposed on the amount of aid paid to families with dependent children. To reduce overall AFDC expenditures by 75 to 100 million dollars in fiscal year 1969-70, the New York Legislature in March, 1969, severely reduced the AFDC standard of need, and consequently the amount of aid paid in response to "the spiraling rise of public assistance rolls and the expenditures therefore," such reductions to be implemented by July 1, 1969. Section 131-a, New York Social Services Law. On April 10, Petitioners, on behalf of themselves and the 850,000 moth-

ers and children in New York dependent on AFDC, brought suit in the United States District Court to enjoin implementation of the welfare cutback on the ground that it offended the federal command, Section 402(a)(23), on which New York's use of federal AFDC monies is conditioned, and on the ground that the even greater reductions for the metropolitan counties outside New York City offended the Equal Protection Clause of the Constitution. A temporary restraining order was entered and a three-judge court quickly convened, which, after final submission on both claims and finding the Constitutional claim substantial, dissolved itself on the ground that the Constitutional claim was moot and unripe in light of the Respondent Administrator's discretionary power, then unexercised, to rectify the discriminatory schedules then being implemented. The single district judge on remand found that the reduced schedules did violate the federal statutory command and enjoined its final implementation. The Circuit Court found that the Federal District Court was in these circumstances without jurisdiction to adjudicate the controversy.

1. Under this Court's decision in *King* v. *Smith,* 392 U.S. 309 (1968), is a justiciable controversy presented where recipients of Aid to Families with Dependent Children seek to redress injuries caused to them by the failure of state officials to comply with the fundamental plan conditions of the federal Social Security Act while continuing to accept the substantial federal funds given in exchange for a commitment to comply with these conditions?

2. Does a United States District Court abuse its discretion in adjudicating a substantial and urgent federal

statutory claim which is plainly pendent to a concededly substantial Constitutional claim under 42 U.S.C. §1983 and 28 U.S.C. §1343, because the vindication of the federal claim is likely to entail additional state expenditures or because the Department of Health, Education and Welfare, with its views before the court as a party *amicus*, has the unused authority to order cutoff of federal funds?

3. Does a substantial Constitutional claim properly brought under 42 U.S.C. §1983 to enjoin administrative implementation of discriminatory schedules become moot and unripe because the Defendant Administrator has discretionary administrative authority, wholly unexercised, to rectify the challenged discriminatory schedules being implemented?

4. May New York severely reduce "the amounts used to determine the needs of individuals" on July 1, 1969, whilst participating in AFDC, where Congress has ordered the states to adjust such amounts to reflect fully cost of living changes and afforded the states 18 months to make the necessary legislative and administrative adjustments by July 1, 1969?

5. Does the United States District Court have jurisdiction under 28 U.S.C. §§1343(3) or (4) to adjudicate the claim that Respondents have wrongfully deprived these needy children and families of rights secured by the Social Security Act, 42 U.S.C. §601 et seq., and to hear the cause of action created by 42 U.S.C. §1983 for the protection of Petitioners' rights under that federal Act?

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will

have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

Ch. 184, L. 1969 (March 31, 1969) of the State of New York provides in pertinent part:

Section 1. Legislative findings and purpose. The spiraling rise of public assistance rolls and the expenditures therefor, despite a high level of general prosperity and an unprecedented high rate of employment, have become matters of primary social and economic concern to the people of the state of New York. The escalation continues, both in numbers of people requesting assistance and in the costs thereof, despite predicted continuance of general prosperity and high employment.

• • • • •

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of maximum monthly grants and allowances of public assistance for the city of New York social services district and a schedule of maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter.

• • • • •

§5. Such law is hereby amended by adding a new section, to be section one hundred thirty-one-a, to read as follows:

§131-a. Maximum monthly grants and allowances of public assistance. 1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$224	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

4. Any such social services district shall be permitted, with the approval of the commissioner, to adopt a schedule of monthly grants and allowances for lesser amounts than established by the regulations of the department, subject to the above limitations, for all items of need, exclusive of shelter and fuel for heating, if on application to the department made by the social services official thereof with the approval of the appropriate local legislative body, such district establishes to the commissioner that in such district the total cost of the items required to be provided and reflected in the schedule, actually is less than the schedule of monthly grants and allowances established by the regulations of the department.

5. In order that the legislature may, from time to time, consider adjustments to reflect changes in the cost of living, the board and the department shall annually make an appropriate report to the governor and the legislature, which report shall include the recommendations of the board and the department relating thereto.

6. Notwithstanding any other provisions of this chapter or other law, a social services official may make provision for the replacement of necessary furniture and clothing for persons in need of public assistance

who have suffered the loss of such items as the result of fire, flood or other like catastrophe, provided provision therefor cannot otherwise be made.

Ch. ——, L. 1969 (May 9, 1969) of the State of New York provides:

Section 1. Subdivision four of section one hundred thirty-one-a of the social services law, as added by chapter one hundred eighty-four of the laws of nineteen hundred sixty-nine, is hereby repealed, and a new subdivision four is hereby inserted in lieu thereof, to read as follows:

4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.

§3. This act shall take effect July first, nineteen hundred sixty-nine, except that section two of this act shall take effect immediately.

Statement of the Case

Recognizing that the federal purpose of protecting the economic security and well being of needy children through Aid to Families with Dependent Children (AFDC) was being undermined by disturbingly inadequate grants in all states and that even further reductions were likely as the numbers of children eligible for aid increased, Congress in January 1968, imposed a significant federal requirement on the states toward "increasing income of recipients of public assistance." Sen. Rep. 744, 90th Cong., 1st Sess. (1967). Congress departed from the 32-year old policy of allowing states wide latitude in determining standards of need and amounts of payment under AFDC, see *King* v. *Smith*, 392 U.S. 309 (1968), and mandated that by July 1, 1969 the states participating in AFDC increase their standard of need in force on January 2, 1968 to reflect fully changes in living costs since those standards were last established, and to adjust grant levels accordingly. Section 402(a)(23), P.L. 90-248, Social Security Amendments of 1967, 42 U.S.C. §602(a)(23).

The federal statute, on its face and from its legislative evolution, represents a modest interim step pending more fundamental reform, a stop-gap against injury to children and family integrity as a result of inflation and foreseeable further deterioration in grant levels. In it Congress sought to stabilize prevailing grant levels during a period of national consideration of more comprehensive changes in our national welfare system affecting disadvantaged families. Since increases were required to reflect the spiraling cost of living the states were allowed ample

time to July 1, 1969, to make the necessary legislative and administrative adjustments[2] (45a-49a).

The cost of living rose in New York 10.1% from the time of the last adjustment of AFDC need standards in May 1968, to July 1, 1969. Rather than increasing grants to keep pace with inflationary living costs, the New York legislature, in March, 1969, repealed a long-standing authorization to Respondent to make yearly increases for rising living costs and to set grant levels "in accordance with standards of health and decency in the community." New York Social Services Law §131, L. 1940, c. 619 §7, amended by L. 1950, c. 364 §2. Instead, the legislature itself established a reduced statutory schedule of grants based on the "costs of delivering the needs of recipients," and in explicit response "to the spiraling rise in welfare rolls and the expenditures therefor." New York Social Services Law §131-a, L. 1969, c. 184 (March 31, 1969) (hereinafter Section 131-a). As the Governor described the Act: "My proposal for limiting public assistance and care payments . . . will include elimination of the non-recurring special need grants [and] reduction of public assistance eligibility standards. . . . "[3]

The Governor initially proposed an across-the-board 5% cut in all State expenditures for the 1969-1970 fiscal year. While cuts in most other areas were restored, the budget for AFDC was reduced even further by at least

---

[2] "The only reason why the delayed effective date is necessary is to give States an opportunity to change their state plans without taking away from them in the meantime the federal matching funds." 113 Cong. Rec. p. 16817 (Daily Ed., Nov. 20, 1967) (Remarks of Senator Harris).

[3] Executive Budget for Fiscal Year April 1, 1969 to March 31, 1970, at p. 14. Doc. No. 48.

13% from projected expenditures at then-prevailing levels (38a-41a). This reduction in the State's share of AFDC compels a corresponding reduction in the local 25% and federal 50% shares, amounting in total to a reduction of 75 to 100 million dollars. The budget cuts are accommodated by statutory grant schedules severely reducing the amounts afforded to meet the needs of families with older children, particularly teenage children, and abolishing entirely amounts to meet such basic needs as clothing and home furnishings for all recipients in the State and school lunch allowances and such urgent or special needs as diets for diabetics and cardiacs and medically-dictated telephones. For recipients outside of New York City, the legislative reductions are even greater (31a-36a). These reduced schedules were to be administratively implemented across the state as soon as feasible, on July 1, 1969.

Pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4), and 28 U.S.C. §1331, this action was instituted on April 9, 1969, by ten needy families on behalf of themselves and 850,000 other parents and children wholly dependent on AFDC for the rudiments of life. It sought to adjudicate in a federal district court the validity *vel non* of the reduced statutory schedules and to enjoin the Respondent from proceeding to implement them on the ground that the severe reductions violate Section 402(a)(23) of the federal Social Security Act, as amended 1967, 42 U.S.C. §602(a)(23), which requires that all states participating in AFDC:

> " . . . provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and

any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted;"

Petitioner's second claim was that the even greater legislative reductions then being implemented in the metropolitan counties outside New York City, where living costs are assuredly comparable to costs in the City itself, violate the constitutional guarantee of equal protection and the Social Security Act requirement of statewide uniformity and equality of treatment for needy persons, 42 U.S.C. §602(a)(1) and (3).

Since a substantial constitutional challenge to a statewide statute was presented, a three judge court was quickly convened. District Judge Weinstein found, after several hearings, that the potentially dispositive pendent federal statutory claim should also be referred to the three-judge court, in accordance with the normal procedure, particularly since "all parties agree that time is of the essence," (7a). "A three-judge court appears to be the appropriate vehicle for speedily resolving all the issues in this case so that uncertainty may be eliminated as soon as possible" (7a). *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U.S. 73 (1960); *Brotherhood of Locomotive Engineers* v. *Chicago, Rock Island and Pacific Ry.*, 382 U.S. 423 (1966). A temporary order was quickly issued on the basis of the "extensive briefing, affidavits of the individual plaintiffs, and experts' testimony" showing that, in view of the impoverished circumstances of the plaintiffs, the reductions would cause irremediable harm (7a). The order restrained the Respondent from taking irreversible steps toward im-

plementing the statewide reductions. The three judge panel, Circuit Judge Moore and District Judges Weinstein and Mishler, found that it was properly convened, continued the restraining order, and considered extensive testimony, affidavits, statistical material and charts, official documents, briefs and arguments. Submission of evidence and argument before the three judge Court on cross motions for summary judgment on both the constitutional and statutory claims were completed on May 2.

On Friday, May 9, during the closing hours of New York's 1969 Legislative session, the Respondent obtained administrative power to increase the statutory grant levels for counties outside New York City by some uncertain amount upon some unspecified showing by the county legislature or finding by the Respondent Administrator that the costs of items were higher than those reflected in the statute. New York Social Services Law §131-a(4), as amended (May 9, 1969). The lower statutory levels were to be implemented absent the exercise of this wholly discretionary power, and the increases could not be higher than the reduced levels set for New York City. Petitioners were unaware of this change, when on Monday, May 12, the three judge Court, without notice or an opportunity for hearing, ruled *per curiam* that although it was *properly* convened to hear the case, the substantial constitutional issue had been rendered moot or unripe by this, then unexercised, administrative discretion. It remanded the case to the District Judge for appropriate proceedings.[4] Petitioners

[4] The three judge Court conceded that petitioners had no administrative remedy before the state agency to compel the exercise of this discretionary power and hence even suggested that petitioners

promptly moved to be heard before the three judge Court and questioned the dismissal of a substantial constitutional claim because of unexercised administrative discretion in a suit properly brought under 42 U.S.C. §1983. That motion was pending until June 5, the day after final argument in the Court of Appeals, when it was denied. Since the evidence and argument before the three judge Court on both claims had been extensive and exhaustive, upon remand, Judge Weinstein immediately transformed the restraining order into a preliminary injunction to allow the Respondent to pursue an interlocutory appeal. Judge Weinstein requested further information about the evolution of the State AFDC estimated budget, as the predicate for summary judgment and entered an all but dispositive 64-page opinion in support of the preliminary injunction.

Judge Weinstein carefully considered the jurisdictional question. He found that: federal jurisdiction initially existed over both the constitutional and the pendent statutory claim; "[o]nce pendent jurisdiction attaches, a federal court has power to decide the entire case (17a);" and, to abstain from deciding the pendent claim would be "entirely inappropriate, wasteful of judicial energy and dangerous to the litigants (19a)." He found the exercise of

---

seek mandamus in the state courts, though the Respondents' duty under the statute was plainly discretionary (12a).

In regard to the dissolution and the statutory claim, the three-judge court concluded with the impenetrable statement:

> "We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged Constitutional issue or after it decided the Constitutional issue against the Plaintiffs. *Cf., King* v. *Smith,* 392 U.S. 309, 312, n. 3 (1968). Under the circumstances of this case, there is no reason for continuing the three-judge court" (12a).

federal jurisdiction compelling for several reasons. First the pendent statutory claim was not based on state law, but "poses crucial and important questions of federal statutory law," involving "the fundamental rights of children" and "the expenditure of billions of dollars in federal monies" (19a). Second, "(J)udicial economy, convenience and fairness to litigants . . . compel retention of jurisdiction. Speedy final determination . . . is essential to both parties . . ." (19a-20a). Finally, the expenditure of time and effort by the litigants and the Court had been enormous and "would be, to a large extent, wasted were all these materials to be offered anew in a state court" (20a). Judge Weinstein also found that there was general federal question jurisdiction under 28 U.S.C. §1331, since the uncontroverted evidence showed that the reductions in grants would likely result in severe immediate and permanent injury to the children's "mental and physical development" (22a). He did not reach the question whether 28 U.S.C. §1343(3) and (4) provided an independent basis for jurisdiction of the Social Security Act claim (25a).

The Department of Health, Education and Welfare, the City of New York, and Nassau County were before the District Court throughout these proceedings as *amici curiae* and, although the localities' financial interest is equal to the State's and the federal government's is twice as large, none interposed any objection to the course of proceedings or the relief sought. The Respondents sought to have H.E.W. joined as a party defendant, which effort was "strenuously opposed" by the federal agency (3a). H.E.W.'s views were before the District Court in the form of a regulation under Section 402(a)(23) and an extensive brief submitted in a companion case. Despite the known

requirement of Section 402(a)(23) New York did not seek the advice or approval of H.E.W. before enacting in final binding legislative form the reduced standards of need and amount of aid to be paid. On April 16, James Callison, the Regional Commissioner of H.E.W., informed the Respondent that "Section 131-a of New York's Social Services Law . . . will raise a question of conformity with the federal requirements unless the State can establish [facts showing a living cost adjustment]." The Respondents have not yet deigned to reply to the questions raised by the federal agency. There has been no further action by H.E.W.[5]

On May 21 the Court of Appeals granted Respondents' motion to expedite the interlocutory appeal, each party being afforded approximately one week for briefing, the case having been fully developed below. Argument before a specially designated Circuit Court panel, Chief Judge Lumbard, Judge Hays and Feinberg,[6] was had on June 4, when the Court denied the request for a stay of the injunction, stating that a final decision would be rendered forth-

---

[5] As this Court has observed, "raising questions" is the H.E.W. euphemism for disapproving a state plan condition, without invoking the sanction of cutoff of federal funds. See *King* v. *Smith*, *supra*, at ns. 11 & 23.

[6] Circuit Judge Moore, the presiding judge on the three-judge district court panel was designated to sit on the appellate panel along with Chief Judge Lumbard and Judge Feinberg, two of the judges who heard the initial application for a stay and expedition. To avoid further complexities and insure a validly constituted panel, Petitioners reluctantly brought 28 U.S.C. §47 to the attention of the Circuit Judges. Thereupon Chief Judge Lumbard designated Judge Hays to sit.

Section 47 provides:

"Disqualification of trial judge to hear appeal."

"No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

with. On June 11 the Court of Appeals *sua sponte* granted the stay without opinions, Judge Feinberg dissenting. On June 16 the Circuit Court denied Petitioners' motion for a final order so that expedited proceedings could be sought immediately in the Supreme Court; it also denied the motion to vacate the stay. On June 16 New York supplied the District Court with the limited information which the court had requested on May 15th. On June 18, without need of further hearing or argument, Judge Weinstein issued a summary judgment and permanent injunction for Petitioners based largely on the extensive data submitted to the three judge Court, which data was found to be "consistent so far as legally relevant." Judge Weinstein found that the New York State statute effects "drastic cuts in both the standard of need and level of payment . . . in violation of the Congressional mandate embodied in 402 (a)(23) . . ." (39aa). The decrease in total AFDC payments under the New York State program is "no less than $75,000,000," of which the state's share is "approximately 30%" (43aa). New York's appeal was immediately consolidated with the pending interlocutory appeal and the permanent injunction was stayed without hearing on June 19.[7]

On July 16 the Court of Appeal issued three opinions, Chief Judge Lumbard and Judge Hays separately finding

[7] It was in this posture that the Supreme Court was asked in the final days of the October 1968 term to grant immediate review before judgment of the Circuit Court, and to vacate the stay, the latter application having been made to Mr. Justice Harlan and referred by Mr. Justice Brennan to the full Court. This Court denied Petitioners' motions and dismissed the appeal for lack of jurisdiction on June 24, Mr. Justice Douglas and Harlan not participating. *Rosado* v. *Wyman*, —— U.S. —— (1969). The Petitioners thereupon filed in the Circuit Court an appeal from the order of the three-judge court, which was consolidated with the two appeals then pending.

for a variety of alternative, sometimes conflicting, reasons that the federal court was without authority to decide the Social Security Act claim.[8] Judge Hays found that the federal district court had no jurisdiction to hear the pendent statutory claim. His view was that judicial power rests in individual judges rather than in the District Court, and "[s]ince the single judge at no time had jurisdiction over the constitutional claim, there was never a claim before him to which the statutory claim could have been pendent" (51aa). He considered the three judge court's apparent effort to remand the pendent claim to the single judge futile "since with the dissolution of the three judge court the statutory claim was no longer pendent to any claim at all, much less to any claim over which the single judge could exercise adjudicatory power" (51aa). Judge Lumbard expressly disagreed with this ruling (62aa). But he found, and Judge Hays seemed to agree, that the District Court had abused its discretion in exercising jurisdiction over the pendent federal claim, since H.E.W. had not taken final action by condemning the New York Statute and cutting off federal matching funds, and since the "practical effect" of the District Court's vindication of the federal claim would likely be to increase State expenditures (63-65aa, 51-53aa). Neither opinion suggests that the suit was barred by the traditional standards of primary jurisdiction, exhaustion of administrative remedies, or the Eleventh Amendment. Rather the factors relied on are said to make out an abuse of discretion on the part of Judge Weinstein in resolving the federal issue. Judge Lumbard also observed that decisions of such large import

[8] U.S. Law Week observes that "The only thing that two judges can fully agree upon is that the single judge should not have exercised jurisdiction." 38 USLW 1023 (Aug. 5, 1969).

are better made by three judges rather than one, although both Circuit Judges expressly affirmed the three-judge court ruling dissolving itself and remanding the statutory claim to the single judge (50aa, 62aa).[9]

Not resting on this plethora of jurisdictional rulings alone, Judge Hays went on to consider the merits and ruled that despite the comprehensive statutory language requiring a repricing adjustment to both the "amounts used by the State to determine the needs of individuals" and a proportional adjustment to "any maximums that the State imposes on the amount of aid paid," neither federal requirement had any application to the State of New York. He found that since New York had once increased the amounts used to determine needs in May, 1968, after the federal statute was enacted, the State was then free to abolish these increases either before or after July 1, 1969. The first part of the federal statute requires no more than a momentary repricing of the standard of need by July 1, 1969. Contrary to all existing interpretations of 402(a)(23), including H.E.W.'s, Judge Hays found that the second part of the federal statute only applies in states which impose an arbitrary cutoff on the amount which a family may receive regardless of family size, these maximums being the subject of recent Constitutional invalidations under the Equal Protection

---

[9] Judge Hays found main support for dissolution in the Respondent's later administrative adjustment of grant levels in the metropolitan counties outside New York City, albeit without noting that the discretionary adjustment left the equal protection attack exactly as it was at the outset of this lawsuit. The amended schedules have subsequently been found unconstitutional in regard to Aged, Blind and Disabled recipients by a unanimous three-judge court. *Rothstein* v. *Wyman*, —— F. Supp. —— (S. D. N. Y., Civ. No. 69-2763, Aug. 4, 1969).

Clause (57-60aa).[10] Judge Lumbard did not express his views on the substantive issue. Both judges summarily rejected, but for different reasons, the claim that 28 U.S.C. §1343(3) & (4), in conjunction with 42 U.S.C. §1983, provided an independent basis for jurisdiction (55aa, 64aa).

Judge Feinberg vigorously dissented from the jurisdictional rulings of the majority under which "the procedural labyrinth of the three-judge court has swallowed up a substantial claim that thousands of AFDC recipients in New York State will be greatly harmed by the violation of a federal statute," and which allow "New York to receive millions of federally granted dollars and then proceed to ignore the federal law" (77aa, 65aa). He found that even though the three judge court could have more properly decided the pendent statutory claim before it, the single district judge had jurisdiction to decide the statutory claim after the remand from the three judge court. He found unpersuasive the reasons which the majority offered for their finding that Judge Weinstein had abused his discretion in retaining jurisdiction, and agreed with the district judge that the factors supporting the exercise of federal jurisdiction were compelling. He extensively considered the substantive issue, rejected Judge Hays' construction as making "a mockery of congressional purpose" and fully supported the conclusions of the district court (77aa).

---

[10] *Dews* v. *Henry*, 297 F. Supp. 587 (D. Ariz. 1969); *Williams* v. *Dandridge*, 297 F. Supp. 450 (D. Md. 1969); *Westberry* v. *Fisher*, 297 F. Supp. 1109 (S.D. Me. 1969).

Reasons for Certiorari

1. The substantive question partially avoided below involves the application and timely enforcement of a significant provision in a federal regulatory program of nation-wide scope affecting the welfare of 6.2 million dependent children and their parents and the expenditure of 2.7 billion dollars in federal and state monies.[11] The rights founded on this provision in this case—the right of 850,000 needy dependent children and their parents in New York to receive a modest increase rather than an immodest decrease in subsistence grants—are fundamental. Even a slight increase in welfare grants is of critical importance to a family living on the borderline of subsistence; any decrease threatens the health and well-being of these vulnerable families. The divided Circuit Court leaves undisturbed the findings that the New York Statute affects "drastic cuts in both the standards of need and level of payments" (39aa) and that such cuts "threaten injuries to children's physical and mental development . . . [and] may irreversibly retard mental and physical development" (22a). The severity of the cutback, and the harms flowing therefrom, are well documented in the opinions and the extensive record in this case.

The national legislative policy expressed in 402(a)(23) renders expeditious and authoritative enforcement imperative. The provision is not a comprehensive solution to the well-recognized inequities in our national welfare system, including the wide variations among the states, exclusion

---

[11] January 1969 figures from Welfare in Review, 1969, Volume 7, No. 3, Table 7.

of certain classes of needy families and the below subsistence levels of grants in all states. Congress in 1967 postponed such a solution to the overall problem. But it took a significant interim step to prevent foreseeable further deterioration in grant levels in response to rising AFDC caseloads by stabilizing grant levels prevailing in January 1968 and requiring one modest inflationary adjustment by July, 1969. There can be little doubt that Congress fully appreciated the language, import and effect of Section 402(a)(23) as finally enacted.

The statute, for one, represented a self evident departure from the tradition of no federal control over state need standards and grant levels, see *King* v. *Smith, supra,* a departure which was obviously apparent to the committees and the entire Congress. Two, the language of the basic repricing requirement remained practically identical throughout the legislative evolution in the committees versed in public assistance administration.[12] Three, in adopting the requirement of one overall cost of living increase, while declining to accept the companion proposals, Congress made a choice of goals which is free from ambiguity. Four, in using the comprehensive term "the

---

[12] See, S. Rep. No. 744, 90th Cong., 1st Sess. at 293 (1967); U.S. Code, Cong. & Admin. News, 2834, 2840, 3132, 3179, 3208-09, 5156, 5455, 5501 (1967); Senate-House Conf. Rep. No. 1030, 90th Cong., 1st Sess.; 133 Cong. Rec. 16701 (1967).

The respective committees were the Senate Finance Committee and the House Committee on Ways and Means, both responsible for Social Security Act litigation and intimately familiar with both the Act and the details of AFDC administration.

The legislative evolution is extensively set forth in the opinions of Judge Weinstein and Judge Feinberg in the instant case and the opinions of the three-judge courts in *Lampton* v. *Bonin,* —— F. Supp. —— (E.D. La. Civ. No. 68-2092-E, 1969), and *Jefferson* v. *Hackney,* —— F. Supp. —— (N.D. Texas, Civ. No. 3-3012-B–3-3126-B, 1969), which are submitted for the convenience of this Court along with this Petition.

amounts used by the State to determine the needs of individuals" and going on to require adjustment of "any maximums that the State imposes on the amount of aid paid to families," Congress left little room for evasion or nullification. Five, in making the pricing adjustment a plan condition for continued participation in AFDC and allowing ample time for the necessary state legislative change and appropriation, Congress unequivocally expressed its intention to compel the states to raise AFDC payments.[13] New York, a leadership state in welfare programs, has responded to rising caseloads in the one manner Congress forbade. In so doing it has ignored the plain language of 402(a)(23), the applicable H.E.W. regulation,[14] as expounded in briefs

---

[13] See, 113 Cong. Rec. 16817 (Daily Ed., Nov. 20, 1967) (Remarks of Senator Harris).

[14] The initial H.E.W. regulation issued on February 8, 1968, immediately after enactment of 402(a)(23), merely restated the language of the statute. Handbook of Public Assistance Administration, Pt. I, Section 1200. H.E.W.'s State Letter of January 22, 1968, entitled "Limitation on Federal Sharing in AFDC—P.L. 90-248" informed that "states should be aware of provisions in the Social Security Amendments of 1967 which may make more individuals eligible, such as the requirement . . . for updating AFDC assistance standards and payment maximums—effective July 1, 1969."

The current H.E.W. view was first promulgated in a later regulation, July 17, 1968, which states:

> "In the AFDC plan, provided that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (*i.e.*, combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with paragraph (a)(3)(viii) of this section. Nevertheless, if a State

filed by the United States in two other cases,[15] and the not unplain Congressional history. Such backsliding is in the teeth of an immediate national legislative policy requiring stability and some progression pending further overall reform. It is obvious that if the federal provision is to effect Congressional will and prevent the very evils Congress sought to avert, it must have effect immediately, not six to twelve months hence.

2. Section 402(a)(23) represents a notable departure from past federal policy, see *King* v. *Smith*, 392 U.S. 309, 318-19, 334, and of course has an impact on the autonomy of all the states in administering AFDC. The impact is largely financial and indeed, this fact played a decisive role in the determination of the Circuit Court that the federal court should refuse to adjudicate the Social Security Act claim. In light of the well-known problems of enforcement of federal AFDC requirements, it is not surprising that the federal statute is being ignored by the states and enforcement problems are acute. Severe controversy has arisen over the meaning of this provision and its enforceability; the provision has been extensively examined in the opinions below, the final decisions of two statutory three judge district courts in Texas and Louisiana, a regulation of the Department of Health, Education and Welfare, and the briefs of the United States in these cases.

---

maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standard." 45 C.F.R. 233.20(a)(2)(ii), 34 Fed. Reg. 1394.

[15] *Lampton* v. *Bonin, supra, Jefferson* v. *Hackney, supra.*

The constructions in the Louisiana and Texas cases, both of which are on their way to this Court, and the contrasting result in the instant case, make plain the need for prompt authoritative review in this Court. A unanimous statutory three-judge court in Texas has held that that state's failure to adjust grants upward and the imposition of a percentage reduction on the standard of need violate Section 402(a)(23). *Jefferson* v. *Hackney, supra.* That court read 402(a)(23) to require repricing of the state standard need in force in January, 1968, the date of enactment of 402(a)(23), to account fully for the increase in living costs from the time of last prior adjustment to July 1, 1969; and also to require proportionate adjustment of any maxima utilized by the state in January, 1968. The Section was construed to forbid the state from failing to pass on the increase to recipients by paying a lesser percentage of need through the imposition of a percentage reduction. The court reasoned that a percentage reduction imposed on the adjusted need standard results in a dollar maximum, and 402(a)(23) requires an upward adjustment to "*any* maximums that the State imposes on the amount of aid paid." This is the construction endorsed by District Judge Weinstein and Circuit Judge Feinberg in this case and by dissenting Judge Cassibry in *Lampton* v. *Bonin, supra,* the Louisiana case. The majority in Louisiana agreed that Section 402(a)(23) requires an increase in the need standard and a proportionate increase in any dollar maxima employed in January, 1968. But the divided court, with doubts, adopted the H.E.W. view that a state may avoid actually increasing grants by paying a lesser percentage of the state's need standard through the imposition of the percentage factor.

The H.E.W. Regulation, 45 C.F.R. 233.20(a)(2)(i), 34 Fed. Reg. 1394, requires full adjustment to the need standard in force in January, 1968, and proportionate adjustment to any dollar maxima then used. It also forbids the creation or reduction of any such dollar maxima to avoid passing on the increase. But H.E.W. would allow states to utilize a percentage reduction on the theory that since a percentage reduction is not itself a "maximum" requiring adjustment under 402(a)(23), the statute does not literally address itself to that device. Therefore, H.E.W. would allow states to do what they will with percentage factors.

As pointed out in *Jefferson* v. *Hackney, supra,* this reasoning ignores that the percentage factor, although not itself a maxima, upon application to the need standard directly results in placing a dollar maxima on the amount of aid paid. By definition, a maxima is a dollar amount less than that represented by the state defined need standard. Accordingly, if the percentage factor utilized in January 1968 is retained, it will automatically reflect the required adjustment to the need standard in the amount of aid paid. Of course, the percentage factor need not itself be adjusted. That hardly implies that the statute allows the percentage factor to be manipulated to create a lower dollar maxima than that dictated by the situation prevailing in January, 1968, and the required repricing thereafter.

New York, along with twenty-eight other states, does not utilize maxima of any kind but pays its standard of need in full. The policy of paying the full amount of the state standard of need is continued in Section 131-a which provides that the reduced grant schedule "shall be deemed to make adequate provision for all items of need." Hence,

New York has reduced the amounts used to determine need. Contrary to all of the above authorities, this reduction passes muster under Judge Hays' construction of §402 (a)(23). In his view, 402(a)(23) requires one adjustment to the need standard sometime between January 2, 1968 and July 1, 1969, after which the state may transform its need standard upward or downward as it sees fit. For the statute does not require any state "to increase its AFDC payments or to refrain from decreasing them" (58aa). The required adjustment to "any maxima," according to Judge Hays, applies only to "family maxima" which are utilized in a few states to limit aid to large families. He finds support for this view not in the legislative history of the statute or the administrative usages of the federal agency but curiously in the fact that family maxima have been determined unconstitutional *per se* in several cases decided well after the enactment of 402(a)(23). *Williams* v. *Dandridge,* 297 F. Supp. 450 (D. Md. 1969), *Dews* v. *Henry,* 297 F.Supp. 587 (D. Ariz. 1969), *Westberry* v. *Fischer,* 297 F.Supp. 1109 (S.D. Me. 1969). Although evincing considerable sympathy for state autonomy in the use of federal monies, this construction imputes to Congress an intent to require that states undertake considerable legislative and administrative adjustment before July 1, 1969, which will have no effect before or after that date. There is no attempt to explain this required exercise in futility.

These cases reveal the full range of disputed interpretations of 402(a)(23). As we have seen, there are some important differences between them. Unlike Texas and Louisiana, New York meets need in full and consequently effected its reductions by reducing the amounts used to

determine need. H.E.W. has defended the percentage reductions while "questioning" the New York cutback and explicitly forbidding this method in its regulation and briefs submitted in Louisiana and Texas. The relief requested in New York was to prevent implementation of a severe cutback, while in the other states increases in grants were sought, and in Texas this relief was granted. The statute affecting large numbers of needy children and the administration of considerable federal monies has been explored and debated at length in these cases. This obviously important and disputed statute awaits the construction of this Court.

3. The jurisdictional rulings partially relied upon below not only "allows the State of New York to receive millions of federally granted dollars and then proceed to ignore the federal law granting them" (65aa) but pose far-reaching questions on the justiciability of a Social Security Act claim in a United States District Court. The variety of diverse, and often conflicting, rulings and the separate opinions of Chief Judge Lumbard and Judge Hays are set forth *seriatim* in the Application for a Stay accompanying this Petition. Only the more significant ones will be discussed here.

Both Judges Lumbard and Hays held in separate opinions that a federal court abuses its discretion in deciding a Social Security Act claim pendent to a substantial Constitutional claim, where a likely effect of vindicating the federal claim is to entail substantial state expenditures. Since most all Social Security Act claims affect large numbers of people in New York and all other states, such a ruling effectively bars adjudication in a federal court.

Increased expenditures are one possible, or indeed likely, result whenever the Constitution or Social Security Act require expanded eligibility, *King* v. *Smith, supra, Shapiro* v. *Thompson,* 394 U.S. 618, or increased grants, *Dews* v. *Henry, supra, Williams* v. *Dandridge, supra, Westberry* v. *Fisher, supra.* This is not an Eleventh Amendment problem and there is no viable precedent for allowing a federal court to pick and choose among the plan conditions of AFDC on the basis of its views on which ones are more or less onerous to the states. See *Seward Machine* v. *Davis,* 301 U.S. 548, 594, 614 (1937). Congress prescribed 402(a)(23) as a plan condition for continued participation in AFDC, just as it prescribed plan condition 402(a)(9), now (a)(10), which was enforced by this Court in *King* v. *Smith.* Surely 402(a)(23) is no more or less enforceable because of the extent or character of the violation being challenged thereunder.

Both Judges also held that a federal court abuses its discretion in deciding a pendent Social Security Act claim where the matter is "pending" before the Department of Health, Education & Welfare, which "is far better equipped than the federal courts to review an alleged inconsistency between" the state and federal statutes (53aa). The effort to avoid *King* v. *Smith* on the ground that in *King* "H.E.W. had already given notice to the state that its regulation did not conform" (64aa), treats rather lightly this Court's explicit observation in *King* that "Alabama's substitute father regulation has been neither approved nor disapproved by H.E.W." *King* v. *Smith,* 390 U.S. 309, at n. 11. See also, n. 23. As this Court recognized in *King* v. *Smith* and *Damico* v. *California,* 389 U.S. 416, there is no rule of exhaustion, primary jurisdiction, or discretion,

where the aggrieved party seeking adjudication has no power to invoke or participate in any administrative process, *Frozen Food Express* v. *United States*, 351 U.S. 40, *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407; or where the administrative remedy is wholly inadequate to protect the right asserted, *Monroe* v. *Pope*, 365 U.S. 167, *McNeese* v. *Board of Education*, 373 U.S. 668. Similarly, primary jurisdiction cannot support outright dismissal where the agency cannot grant the relief requested, where the Court is not bound by the agency determination, and where the interim harms are grievous. *Thompson* v. *Texas Mexican Railway*, 328 U.S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422; *United States* v. *Philadelphia National Bank*, 374 U.S. at 353-354; *Pan American World Airways Inc.* v. *United States*, 371 U.S. 296. Such a result is particularly indefensible where, as here, the agency is a party *amicus* with its views before the court in a regulation and brief.

Where there is neither an administrative remedy nor primary jurisdiction for the complainant to invoke, it is obvious that the withholding of relief is, however named, a ruling that the matter is not justiciable, now or later, in a federal court. The litigant is simply powerless to obtain relief before any forum. There is no question of ripeness or standing in this case, since Petitioners are clearly being harmed now by the challenged law. The plurality opinions have simply denied the justiciability of Social Security Act claims within the Second Circuit[18] and denied

[18] Indeed, in the recently decided case of *Rothstein* v. *Wyman*, *supra*, the three-judge district court declined to rule on the Social Security Act uniformity claim because that matter was "pending" before H.E.W.; hence, the court granted relief on the parallel claim founded on the equal protection clause of the Constitution.

Petitioners any forum for vindication of their federal rights. *King* v. *Smith* does not endorse this result and the issue is one of vital import to the public interest and the interests of our nation's most needy and vulnerable citizens.

4. The ruling of the plurality that it is proper for a three-judge district court to dismiss a substantial Constitutional claim because of discretionary administrative authority to adjust the challenged provision is also an issue of importance. This too is to require exhaustion of an administrative remedy which is not available to the litigant, but here in regard to a Constitutional claim concededly brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. The rubric of mootness or ripeness is relied on to ignore *McNeese* v. *Board of Education, supra, Damico* v. *California, supra* and *King* v. *Smith, supra.* But it needs little authority to recognize that a Constitutional claim does not become moot or unripe because of unexercised administrative discretion to correct the wrong complained of; such exists in every challenge to an administrative regulation and in every case where there is an administrative remedy. Judge Hays, however, finds support in the retrospective view that the Respondent Administrator did in fact make some adjustment to the schedules after dismissal. If this be relevant, then it may be noted that the administratively adjusted schedules have been enjoined by a unanimous three-judge court as a violation of equal protection for recipients of the Aged, Blind and Disabled in Nassau County and other surrounding metropolitan counties. *Rothstein* v. *Wyman, supra.* Because of the dismissal in this case, however, the recipients of AFDC in these

counties do not receive the protection of this injunction. The substantial question of the constitutionality of territorial discrimination against recipients of AFDC remains unanswered, and considerable confusion is injected into judicial standards for determining when any constitutional challenge to a provision subject to administrative correction is timely.

5. Without pausing to discuss the propriety of dissolution after hasty disposition of the Constitutional claim at a very late stage of the law suit, the plurality below whipsaws the ouster of the constitutional claim into a holding that the District Court ceased to have jurisdiction upon remand. The novelty and implications of this ruling must be considered particularly in light of the fact that the pendent statutory claim is one arising under the supremacy clause of the United States Constitution and a federal statute. The claim is as federal as the equal protection claim to which it is pendent. To our knowledge, there is no decision, dictum, or suggestion of this Court or any other federal court over a course of almost two centuries that there may be circumstances in which a United States District Court should decline to exercise jurisdiction over a substantial federal cause of action.[17] This Court's decisions are quite to the contrary. *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960); *King* v. *Smith, supra.* So too, are the decisions of the

[17] As Mr. Chief Justice Marshall observed in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 740 (1824), "All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws." See also, H. Hart & H. Wechsler, *The Federal Courts and the Federal System* (1953), at 727.

lower federal courts under the Social Security Act.[18] Although the answer seems clear, we submit that this question too is worthy of review in this Court.

6. Finally, there is the question this Court alluded to as an open one in *King* concerning the circumstances in which "suits challenging state administrative provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." *King* v. *Smith, supra,* at n. 3. Although that question is the subject of considerable scholarly attention, *e.g.,* Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 85 (1967), and of profound importance to recipients of AFDC, it is disposed of below on the ground that the Defendant Administrator is not a "person" within 42 U.S.C. §1983 and 28 U.S.C. §1343 because the gravamen of the attack is on a state statute and on the ground that the claim is without "Constitutional overtones." This ignores that state officials charged with implementation and enforcement of state statutes have long been appropriate persons in suits founded upon the Constitution and federal law, *Ex parte Young,* 209 U.S. 123, 160 (1908); *Georgia R.R.* v. *Redwine,* 342 U.S. 299 (1952), and that the supremacy clause is a part of the United States Constitution.

The question is not so simple. Suits founded upon the Social Security Act against state officials acting under

---

[18] See, *e.g., Solmon* v. *Shapiro,* —— F. Supp. —— (D. Conn. 1969) and *Lewis* v. *Stark,* —— F. Supp. —— (N.D. Calif. 1968) in which three-judge federal courts heard constitutional and pendent claims under the H.E.W. substitute father regulation. *Lampton* v. *Bonin, supra, Jefferson* v. *Hackney, supra,* constitutional claims and pendent claims under 42 U.S.C. §602(a)(23); *Doe* v. *Schapiro,* —— F. Supp. —— (D. Conn. 1969).

color of state law are literally and functionally within 42 U.S.C. §1983, which provides that:

> "Every person who under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable . . . in an action at law, in suit in equity or other proper proceeding for redress."

The section thus creates a federal cause of action for claims based upon rights secured by the Social Security Act, a law of the United States. Historically, 28 U.S.C. §1343 was the jurisdictional counterpart to §1983. *Carter* v. *Greenhow,* 114 U.S. 317, 320; *Pleasants* v. *Greenhow,* 114 U.S. 323 (1884). There is no evidence that Congress intended to change this linkage. Hence, a restrictive interpretation of §1343(3) combined with a restrictive view of §1343(4), would create an anomalous category of cases where there is a substantial federal cause of action under §1983 but no original federal court jurisdiction. The categorical assistance titles of the Social Security Act would constitute, to the best of our knowledge, the only federal regulatory or administrative program in which a federal cause of action cannot be litigated exclusively in a federal forum, much less not at all. Surely the conclusory reasons asserted below do not suffice to resolve this question involving, in the instant case, critical aspects of the welfare of 850,000 families and children and the lawful administration of considerable amounts of federal monies.

Motion to Advance

The reasons for expedition are implicit in the foregoing arguments for certiorari and the character of the harms resulting from this challenged violation of federal law. We refer the Court to the accompanying application for interim relief and the previous Petition for Certiorari and Motion to Expedite submitted before the summer recess for a fuller statement of the reasons supporting expedition. We add only that Petitioners are prepared to file a brief on several days notice and that both parties below had no difficulty adhering to a one-week briefing schedule in the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari and the Motion to Advance should be granted.

Respectfully submitted,

LEE A. ALBERT
Center on Social Welfare Policy & Law
401 West 117th Street
New York, New York 10027
Telephone No.: (212) 280-4112

HENRY A. FREEDMAN
SYLVIA ANN LAW
ROBERT P. BORSODY
Of Counsel

CARL RACHLIN
JAMES SPITZER
DAVID DRASCHLER
General Counsel, National Welfare Rights Organization
c/o Scholarship, Education and Defense Fund, Inc.
164 Madison Avenue
New York, New York 10016

MARTIN GARBUS
Roger Baldwin Foundation of the American Civil Liberties Union
156 Fifth Avenue
New York, New York 10012

BURT NEUBORNE
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

DAVID GILMAN
General Counsel, City-Wide Coordinating Committee of Welfare Groups
c/o MFY Legal Services Inc.
759 10th Avenue
New York, New York

CESAR PERALES
Williamsburg Legal Services
260 Broadway
Brooklyn, New York 11211
(*for Petitioner Rosado*)

VIRGINIA SCHULER
Brownsville Legal Services
424 Stone Avenue
Brooklyn, New York
(*for Petitioners Folk and King*)

EDWARD V. SPARER
The Yale Law School
New Haven, Connecticut 10520

HAROLD J. ROTHWAX
DAVID A. DIAMOND
MARIANNE J. ROSENFIELD
MFY Legal Services, Inc.
320 East Third Street
New York, New York

MORT COHEN
South Brooklyn Legal Services
152 Court Street
Brooklyn, New York 11201
(*for Petitioner Hernandez*)

MORTON FRIEDMAN
112-10 Farmers Boulevard
St. Albans, New York

APPENDICES

INDEX TO APPENDIX

(Appendices A through F, containing the earlier opinions and orders in this case, were previously submitted to this court in *Rosado et al.* v. *Wyman et al.*, Oct. Term, 1968, No. 1539. These appendices are hereby incorporated.)

APPENDIX G

Opinion and Order of Hon. Jack B. Weinstein Granting Plaintiffs' Motion for Summary Judgment

In this Court's opinion granting plaintiffs' motion for a preliminary injunction, we held that section 402(a)(23) accomplishes two results. First, it creates a floor under present levels of benefits in the Aid to Families With Dependent Children Program (AFDC) by prohibiting cuts in welfare payments. Second, it requires that all states provide at least one increase both in the standard of need and the level of payment by July 1, 1969 to at least partially compensate for the rise in the cost-of-living.

There is "no genuine issue as to any material fact" on the question whether section 131-a of New York's Social Services Law meets this dual requirement. The statistical data supplied by both defendants and plaintiffs, while differing in some particulars, is consistent so far as it is legally relevant.

The change to the flat grant system—long favored by some as a more enlightened method of public assistance—has been used as a subterfuge to enact drastic cuts in both the standard of need and level of payment to meet the exigencies of a state budget in violation of the Congressional mandate embodied in section 402(a)(23). Accordingly, plaintiffs' motion for summary judgment must be granted.

Set out below are the Court's findings of fact and conclusions of law:

1. The schedules contained in section 131-a effect a substantial reduction in the standard of need and level of payment.

The estimates submitted by the state are that 111,899 welfare families will receive increases under section 131-a; that the total monthly amount of these increases is $1,716,910; and that the average monthly amount of the increase per family is $15.34. The decreases under section 131-a are greater in all respects: 141,313 families will receive decreases; the total monthly amount of these decreases is $3,420,441; and the average monthly decrease is $24.20. These figures are set out in the table below:

	Number of Families	Total Monthly Amount	Monthly Average Change
Increases	111,899	$1,716,910	$15.34
Decreases	141,313	$3,420,441	$24.20

These statistics reflect only the changes in the regular recurring grant plus, for New York City only, the amount of the cyclical grant. They do not include the loss to dependent children of all the special grants—available under present law because they have heretofore been deemed by the state essential to children's welfare; these special grants are abolished under section 131-a to achieve a further reduction in state expenditures of many millions of dollars.

Approximately 80% of the AFDC recipients in the state reside in New York City. The figures for New York City are set out below:

	Number of Families	Total Monthly Amount	Monthly Average Change
Increases	79,838	$1,091,471	$13.67
Decreases	110,908	$2,772,313	$25.00

Plaintiffs have submitted statistics which attempt to compute the effect of eliminating non-recurring special grants for New York City residents. With this new variable included, the number of families receiving increases in New York City under section 131-a drops to a mere 245 and the total monthly amount of these increases is $530 for all of New York City. Only a very rare class of New York City families—those with six or seven children, the oldest of whom was five years of age—would receive any increase at all. Conversely, the number of families suffering decreases rises to approximately 173,900 and the aggregate dollar amount of their decreases totals approximately $5,950,000 per month.

Set out below is a table comparing the total average grant (recurring and special) per family in New York City under present law and under the section 131-a schedule:

Family Size	Present Law	Section 131-a
2	$137.42	$116
3	$197.13	$162
4	$250.84	$208
5	$315.55	$254
6	$352.26	$297
7	$418.97	$340
8	$463.68	$383
9	$505.39	$426
10	$571.10	$469

2. The elimination of special grants constitutes a reduction of the standard of need and level of payment.

3. The elimination of the cyclical grant for New York City residents constitutes a reduction of the standard of need and level of payment.

4. The elimination of differentiated larger grants for the needs of families with older children and the failure to provide for families with children above the mean age of the oldest child in families of a given size constitutes a reduction of the standard of need and level of payment.

5. The transfer of seven counties which are presently included in the SA-1 schedule to a lower schedule constitutes a reduction of the standard of need and level of payment for AFDC recipients of these counties. The small upward adjustment of the schedules of payments in some counties outside New York City promulgated administratively pursuant to the amendment to section 131-a discussed in the *per curiam* opinion of the three-judge court, *Rosado* v. *Wyman*, —— F. Supp. —— (E. D. N. Y. 1969), does not offset the reductions; the new schedules constitute a reduction in the current standard of need and level of payment.

6. Some persons who presently receive supplementary AFDC benefits will no longer be eligible for assistance under section 131-a.

7. New public assistance programs instituted by New York State will not offset the reductions effected by section 131-a.

(a) Food Stamp Program. The Food Stamp Act provides that participating states shall not decrease welfare payments as a result of participation in this program. 7 U. S. C. § 2019(d). The state concedes that "Neither the donated commodities or food stamps may be deemed or construed to be public assistance in whole or in part or a substitute therefor. Participation in either program by recipients or others is completely voluntary."

In any event, federal funding is not yet certain and in many instances all that will be involved is a change from the Commodity Distribution Program. No projected food stamp program can offset the reductions in benefits described above.

(b) Day Care Center Program. This program involves only a handful of recipients. It cannot serve as a substitute for AFDC payments, and it will be some time before the program is significantly expanded. No projected day care center program can offset the reductions in benefits described above.

(c) Other Programs. Such programs as the Work Incentive Program are of minor significance and have little effect on the issues before us. Neither this program nor any other projected program nor any combination of such programs can offset the reduction in benefits described above.

8. The Governor's 1969-70 Proposed Budget contained an AFDC appropriation request of $321,125,000 as a part of a total Local Assistance Fund request of $1,040,014,000. In the March 29, 1969 budget bill, the legislature appropriated only $912,014,000 to the Local Assistance Fund—a reduction of $128,000,000. Of this sum, $290,459,000 was earmarked for AFDC—a reduction of approximately $30,000,000 or 10%. When the $5,000,000 amount in the Governor's Proposed Budget for 1969 cost-of-living increases is eliminated, the reduction for AFDC is approximately $25,000,000. Since the state's share is approximately 30%, the decrease in total AFDC payments under the New York State program is no less than $75,000,000.

Defendants contend that the $25,000,000 reduction in the state's share of AFDC costs "is the result of the allowance

schedules in Section 131-a including the elimination of special grants, the revision of Section 139-a, addition of Section 132-a and any other changes made by Chapter 184, Laws of 1969." However, no substantial portion of the savings could have been expected to result from changes in the welfare law other than section 131-a. The $25,000,000 reduction represents almost entirely savings in AFDC grants.

9. The additional $42,000,000 reduction in the AFDC appropriation contained in the May 2, 1969 Supplemental Budget was enacted in contemplation of increased federal funds and will not affect AFDC payments.

Plaintiffs' motion for summary judgment is granted.

So ordered.

Dated: Brooklyn, New York
June 18, 1969

/s/ JACK B. WEINSTEIN
U.S.D.J.

APPENDIX H

Opinion and Order of the United States Court of Appeals for the Second Circuit Vacating Preliminary and Permanent Injunctions, Reversing Summary Judgment and Affirming Dissolution of Three Judge Court

(1) Appeals from an order and a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* —— F. Supp. —— (1969) and —— F. Supp. —— (1969), granting a preliminary injunction and a permanent injunction against enforcement of Section 131-a of the New York Social Services Law, Law of March 30, 1969, ch. 184, §5 [1969 McKinney's Session Laws of New York 215, 217], and granting summary judgment for plaintiffs-appellees. (2) Appeal from an order of a three-judge court of the Eastern District of New York, dissolving itself on the ground that the issue for which it was established was moot and that it had before it no new issue then ripe for adjudication.

(1) The injunctions are vacated; the decision granting summary judgment is reversed. (2) The order of the three-judge court is affirmed.

HAYS, *Circuit Judge*:

Defendants-appellants, the New York Commissioner of Social Services and the New York Department of Social Services appeal from an order and a judgment of the United States District Court for the Eastern District of New York granting a preliminary injunction, —— F. Supp. —— (1969), and a permanent injunction, —— F. Supp. —— (1969), against enforcement of Section 131-a of the New York Social Services Law.[1]

---

1 Law of March 30, 1969, ch. 184, §5 [1969 McKinney's Session Laws of New York 215, 217].

Subsections 1-3 of Section 131-a provide:

131-a. Maximum monthly grants and allowances of public assistance

1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

(*continued on following page*)

An appeal by plaintiffs-appellees from a related decision of a three-judge court has been consolidated with the appeals referred to in the preceding paragraph.

I.

Plaintiffs-appellees in this class action are welfare recipients residing in New York City and in Nassau County. They receive payments pursuant to the Aid to Families with Dependent Children program (AFDC) of the Social Security Act, 42 U.S.C. §§601-10 (1964, Supp. IV 1965-68). Under this program, in which all states participate, the federal government provides funds to the states on the condition that the plans for use of the funds meet various federal requirements. 42 U.S.C. §602(a) and (b) (1964, Supp. IV 1965-68). The states and their subdivisions also provide funds and each state administers its own program.

Appellees raised two principal claims in their complaint. The first was that Section 131-a violated Section 602(a)(23) of the Social Security Act[2] as amended in 1967 by reducing the amount of the AFDC benefits paid to them. The sec-

---

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$224	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

2 Social Security Amendments of 1967, Pub. L. No. 90-248, §213(b), 81 Stat. 821, 898 (codified in 42 U.S.C. §602(a)(23) (Supp. IV 1965-68)).

ond claim, made by those appellees who are residents of Nassau County, was that Section 131-a violated the equal protection clause of the Fourteenth Amendment by providing for lower payments to AFDC recipients in Nassau County than to those in New York City, although the cost of living is substantially the same in both areas.

A three-judge district court was constituted under 28 U.S.C. §2281 (1964) to hear the constitutional claim.

While the action was pending before the three-judge court, Section 131-a was amended to permit the Commissioner of Social Services to increase scheduled payments for areas outside New York City up to a maximum no higher than the levels for New York City, upon his determination that the total cost of the items included in the schedule for such an area exceeds the amount provided in the schedule.[3] The three-judge court ruled that this amendment mooted the equal protection claim of the Nassau County recipients, by making it possible for their payments to be increased to the level provided for New York City recipients if the cost of living in Nassau County made such an increase appropriate. It concluded that "any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding." The three-judge court also held that the mooting of the constitutional claim made "academic" the question of whether it might have decided the statutory claim in the exercise of its pendent jurisdiction. It then ordered itself dissolved and remanded the case to Judge Weinstein "for such further proceedings as are appropriate." —— F.

---

3 Law of May 9, 1969, ch. 411, §1 [1969 McKinney's Session Laws of New York 652-53].

Supp. —— (1969). The same day Judge Weinstein issued an order temporarily restraining action under Section 131-a. Four days later he issued a preliminary injunction and denied appellants' motion to stay the injunction. On May 21 this court granted appellants' motion for a preference for their appeal from the order granting the preliminary injunction and denied appellants' motion for a stay without prejudice to renewal at the argument of the appeal. The appeal was argued on June 4, at which time the motion was renewed, and on June 11 this court stayed the injunction pending the disposition of the appeal. On June 16 this court denied appellees' motion to vacate the stay and denied appellants' motion to stay proceedings in the district court until the decision on the appeal from the preliminary injunction. The next day appellees appealed to the United States Supreme Court from the order of dissolution of the three-judge court. The appeal was accompanied by a petition for certiorari before judgment to this court and a motion to expedite Supreme Court consideration of the case. On June 18, while the appeal was still pending in the Supreme Court, the district court granted summary judgment for appellees and issued a permanent injunction. The same day appellants filed a notice of appeal to this court from the issuance of the permanent injunction. On June 19 this court granted appellants' motion to stay the permanent injunction and it also granted appellants' motion to consolidate the appeal from the permanent injunction with the appeal from the temporary injunction. On June 24 the Supreme Court dismissed for want of jurisdiction the appeal from the dissolution of the three-judge court on the ground that the order was properly appealable to this court. The Supreme Court also refused to grant certiorari before judgment and

denied appellees' motions to expedite review and to vacate the stays ordered by this court. 37 U.S.L.W. 3492. Appellees thereupon appealed to this court from the order dissolving the three-judge court and that appeal was consolidated with the appeals from the injunctions.

II.

We turn first to the issue raised by the appeal from the order of the three-judge court.

Appellees urge that the three-judge court erred in dissolving itself and that we should order it to resume its deliberations.

The court ordered itself dissolved because of the adoption of an amendment to Section 131-a permitting increased payments to AFDC recipients in Nassau County upon a determination by the Commissioner of Social Services that the increases are required in order to reflect actual cost of living. The three-judge court was of the opinion that the issue raised by the Nassau County plaintiffs was mooted by the amendment to Section 131-a and that the issue presented by the amendment itself was not yet ripe for adjudication.

We are persuaded that the court acted correctly. We are confirmed in this view by the fact that, since the dissolution of the three-judge court, the schedule of payments for Nassau County has in fact been increased by reason of the provisions of the amendment to Section 131-a. If corroboration of the opinion of the three-judge court be needed it is provided by this development. Obviously a determination by the court based upon the situation as it existed at the earlier date would have been premature and its decision would have been rendered moot by the provision of the new schedules for Nassau County. The court was right in refusing

to act on facts that were fluid and subject to early change. We affirm its order dissolving itself.

III.

Appellants contend that the single district judge erred in exercising jurisdiction to issue a preliminary and a permanent injunction on the basis of the statutory claim after the constitutional claim had become moot and the three-judge court had dissolved itself.

Pendent Jurisdiction

The three-judge court specifically refused to decide whether it could have exercised pendent jurisdiction to rule on the statutory claim after it had determined that the constitutional claim was moot. —— F. Supp. at —— (1969). In remanding the case to the single district judge for "appropriate" action the court did not decide whether he could exercise such jurisdiction.

The single district judge ruled that it was proper for him to assert pendent jurisdiction over the statutory claim. —— F. Supp. —— (1969). We find this conclusion to have been in error.

The assertion of a constitutional claim required the convening of a three-judge district court. 28 U.S.C. §2281 (1964). That court is the only court which ever had jurisdiction over the constitutional claim. Since the single judge at no time had jurisdiction over the constitutional claim there was never a claim before him to which the statutory claim could have been pendent. If the three-judge court had attempted to give the single judge power to adjudicate the statutory claim, it could not have done so, since with the dissolution of the three-judge court the statutory claim was no longer pendent to any claim at all, much less to any

claim over which the single judge could exercise adjudicatory power.

King v. *Smith*, 392 U.S. 309 (1968) provides no authority for deciding the pendent statutory claim. There the Court said:

> "We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." *Id.* at 312 n. 3.

While the Court in *King* decided a pendent statutory claim, the constitutional claim to which it was pendent remained viable throughout the litigation. The Court exercised jurisdiction over the pendent statutory claim in order to avoid adjudication of the constitutional issue.

Moreover even if we were to accept the overbroad interpretation of the doctrine of pendent jurisdiction urged upon us by appellees, we would hold in the present case that the district judge's exercise of such jurisdiction was an abuse of discretion.

In *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), it is clear that there are circumstances in which the exercise of pendent jurisdiction is inappropriate. We believe that it is inappropriate here, where, whatever the technical consequences of enjoining enforcement of Section 131-a may be, the practical effect of an injunction is to order the New York legislature to appropriate more funds for welfare.

A federal court should not assert such power over a state legislature unless there is no possible alternative. Even if the district judge had had discretion, he should have refused to rule on the statutory claim.

In *King* v. *Smith, supra,* the relief granted, enjoining the application of the Alabama "man in the house" regulation, did not have the effect of requiring the state legislature to appropriate additional funds. By invalidating the state regulation, the court substantially increased the number of eligible aid recipients but it specifically noted that Alabama was "free . . . to determine the level of benefits by the amount of funds it devotes to the program." *Id.* at 318-19 (footnote omitted). See *Lampton* v. *Bonin,* —— F. Supp. —— (E.D. La. 1969) (three-judge court).

The Department of Health, Education and Welfare is now engaged in a study of the relationship between Section 602 (a)(23) and Section 131-a. HEW, with its acknowledged expertise in the field of social security, is far better equipped than the federal courts to review an alleged inconsistency between a complex state statutory scheme for payments in behalf of dependent children and an ambiguous amendment to the Social Security Act. The district court, even if it had power to act on the pendent claim, should have declined to do so, at least until HEW had completed its consideration of the matter.

Section 1331

The district judge also found that he had jurisdiction to decide the statutory claim under 28 U.S.C. §1331 (1964) which provides for jurisdiction over federal questions where "the matter in controversy exceeds the sum or value of $10,000 . . . ."

The district judge properly held that the claims of the members of the class may not be aggregated to satisfy the $10,000 requirement. See *Snyder* v. *Harris,* 37 U.S.L.W. 4262 (U.S. March 25, 1969). He also correctly ruled that "the monetary loss to each of the plaintiffs

does not approach $10,000." —— F. Supp. at ——. But after finding that appellees could not obtain jurisdiction by showing direct damage of $10,000, the district judge decided that the "indirect damage" they might sustain as a result of their reduced payments was sufficient to satisfy the $10,000 requirement. "Indirect damage" is too speculative to create jurisdiction under Section 1331.

> "It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. The rule was laid down in Barry v. Mercein, 46 U.S. (5 How.) 103, 12 L. Ed. 70 (1847), a child custody case. The 'right to the custody, care, and society' of a child, the court noted, 'is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.' 46 U.S. at 120. Since the statute permitted appeals only in those cases where the 'matter in dispute exceeds the sum or value of two thousand dollars,' the court concluded that it was without jurisdiction:
>
> > 'The words of the act of Congress are plain and unambiguous * * *. There are no words in the law, which by any just interpretation can be held to * * * authorize us to take cognizance of cases to which no test of money value can be applied.' 46 U.S. at 120.
>
> Subsequent decisions have followed this reasoning. See Kurtz v. Moffitt, 115 U.S. 487, 498, 6 S. Ct. 148, 29 L. Ed. 458 (1885); First Nat. Bank of Youngstown v. Hughes, 106 U.S. 523, 1 S. Ct. 489, 27 L. Ed. 268 (1882); Giancana v. Johnson, 335 F. 2d 366 (7th Cir.

1964), cert. denied, 379 U.S. 1001, 85 S. Ct. 718, 13 L. Ed. 702 (1965); Carroll v. Somervell, 116 F. 2d 918 (2d Cir. 1941); United States ex rel. Curtiss v. Haviland, 297 F. 431 (2d Cir. 1924); 1 Moore, Federal Practice ¶0.92[5] (2d ed. 1964)."

Boyd v. *Clark*, 287 F. Supp. 561, 564 (three-judge court, S.D.N.Y. 1968), aff'd on another issue, 393 U.S. 316 (1969) (footnotes omitted).

Section 1343

Appellees argue on two grounds that jurisdiction over the statutory claim exists under 28 U.S.C. §§1343(3) and (4) (1964). Having found that jurisdiction existed under the doctrine of pendent jurisdiction and under Section 1331, the district judge did not rule on this issue.

Sections 1343(3) and (4) provide:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The first contention of appellees is that their claim under the AFDC provisions creates a cause of action under 42 U.S.C. §1983 (1964), for which jurisdiction is conferred by Sections 1343(3) and (4). Section 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint, properly read, does not allege the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The burden of the complaint is that New York's statute, Section 131-a, is not in conformity with the requirements of Section 602(a)(23) of the federal statutes and that therefore New York is not entitled to receive federal grants under the AFDC program. Plaintiffs have no rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all. See *New York* v. *Galamison*, 342 F. 2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965); *Bradford Audio Corp.* v. *Pious*, 392 F. 2d 67 (2d Cir. 1968).

Moreover, it is clear that the defendant Department of Social Services for the State of New York is not a "person" within the meaning of Section 1983. See *Monroe* v. *Pape*, 365 U.S. 167, 187-92 (1961); *Clark* v. *Washington*, 366 F. 2d 678, 681 (9th Cir. 1966); *Williford* v. *California*, 352 F. 2d 474 (9th Cir. 1965). Since the suit here con-

stitutes an attack on a state statute, and not on action taken under it, the plaintiffs' complaint is against the state and not against the Commissioner as an individual. He too is therefore not within the scope of Section 1983.

Appellees' second contention is that the Social Security Act, which contains the AFDC provisions, is a law providing for "equal rights" so that jurisdiction exists under Section 1343(3) independently of the existence of any claim under the Civil Rights Act. Section 602(a)(23) is not designed to secure "equal rights" for purposes of Section 1343(3).

IV.

Although we are persuaded that the district judge had no power to adjudicate this action, we turn to a brief discussion of the merits, since our decision does not rest solely on jurisdictional grounds.

Under the AFDC provisions in effect prior to the enactment of Section 602(a)(23),[4] the states, in order to receive grants under the federal program, were required to set a standard of need under which recipients qualified for payments but they were not required to pay the full standard and in practice many of them did not. See *King* v. *Smith, supra,* 392 U.S. at 318-19, 334. As originally proposed, Section 602(a)(23) would have required each state to pay its full standard of need and to adjust that standard annually in accordance with changes in the cost of living. H.R. 5710, §202, 90th Cong., 1st Sess. (1967). In the statute as finally adopted both the provision requiring the states to pay their full standard of need and the provision requiring an annual cost of living adjustment in that standard were eliminated.

---

4 See note 2, *supra.*

Section 602(a)(23) now provides:

"§602(a) A State plan for aid and services to needy families with children must . . .

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

The appellees contend that the mandated cost of living adjustment requires that all states which, prior to the amendment, were paying benefits equal to their full standard of need must continue to pay their full standard adjusted to reflect the cost of living as of July 1, 1969. In effect, they argue that §602(a)(23) sets a floor under state AFDC benefits, freezing them at their previous level plus the cost of living adjustment.

We believe that Section 602(a)(23) was not intended to have anything like this broad a scope. We read it as making two far less dramatic changes in the law. First, it requires each state to make an adjustment in its standard of need by July 1, 1969, to reflect changes in the cost of living, but does not require any state to pay its standard of need, nor to increase its AFDC payments or to refrain from decreasing them. The second change required by the statute was not intended to affect New York at all. It refers to a practice employed in many states, not including New York, of imposing a maximum on the amount of aid a family may receive, regardless of its

size.[5] The statute requires that family maximums of the type imposed by these states are to be adjusted by July 1, 1969, to reflect changes in the cost of living.

Our construction of Section 602(a)(23) finds support in the rejection by Congress of the much more stringent bill originally proposed. That rejection demonstrated an intent not to impose controls on the levels of benefits set by the states. The Congressional action was entirely consistent with the traditional federal policy of granting the states complete freedom in setting the level of benefits. See *King* v. *Smith, supra,* 392 U.S. at 318-19, 334.

The Conference Report on Section 213 of the bill, which contained the version of Section 602(a)(23) that was enacted, indicates the correctness of a narrow interpretation. In discussing the portion of the pre-Conference version of Section 213 that dealt with certain non-AFDC recipients, the Report states that the Section would have required "each state to adjust its standards for determining need, the extent of its aid or assistance, and the maximum amount of the aid or assistance payable," and thus mandated an increase in aid. However, in explaining the portion of Section 213 that, except for a change from an annual cost of living adjustment to a single such adjustment, became Section 602(a)(23), the Report states only that the bill would require each state to "adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid." Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967),

---

5 Maine, for example, provides $27 per month for each child after the first but permits a family to receive a monthly grant of no more than $250. See *Westberry* v. *Fisher,* 297 F. Supp. 1109 (D. Me. 1969), where a three-judge district court ruled that the Maine regulation imposing a family maximum violated the equal protection clause of the Fourteenth Amendment. See also *Williams* v. *Dandridge,* 297 F. Supp. 450 (D. Md. 1968, 1969) (three-judge court).

reprinted in [1967] U.S. Code Cong. and Admin. News 3179, 3208-09. The absence of any statement that the portion of Section 213 relating to AFDC payments was intended to effect an adjustment in "the extent of [each state's] aid or assistance" is significant in view of the fact that the immediately preceding discussion of the portion of Section 213 relating to other kinds of assistance refers specifically to such an adjustment in "the extent of . . . aid."

The absence in the legislative history of any support for appellees' interpretation of the statute as imposing a floor on payments is especially significant in view of the long-standing Congressional practice of not imposing such restrictions on the states. As HEW said of Section 602(a)(23) in the brief it submitted in *Lampton* v. *Bonin*, *supra*, "The Congress could hardly have paid less attention to it."[6] It is inconceivable that if this were the far reaching measure serving to reverse a basic national policy which plaintiffs claim it was, it should be adopted without comment from committees and individual members of Congress.

That Section 602(a)(23) was not intended to have the broad effect urged by appellees is further indicated by the fact that it is not even discussed in the "Summary of Social Security Amendments of 1967," a joint publication of the Senate Committee on Finance and the House Committee on Ways and Means, which was prepared for the use of the two committees by the committee staffs. Similarly the "Summary of Principal Provisions" of the Senate bill contained in the Senate Finance Committee report

---

6 HEW's brief expresses agreement with our view on the fundamental proposition that Section 602(a)(23) did not mandate increases nor freeze floors, but left the states free to reduce AFDC payments. However the HEW analysis differs from ours in some respects.

makes no mention of the provisions that became Section 602(a)(23). S. Rep. No. 744, 90th Cong., 1st Sess. (1967), reprinted in [1967] U. S. Code Cong. and Admin. News 2834, 2840.

V.

We find that the only obligation imposed on New York by Section 602(a)(23) is that sometime between January 2, 1968, the effective date of Section 602(a)(23), and July 1, 1969, the deadline imposed by the Section, it must adjust its standards of need to reflect the cost of living. The schedules in Section 131-a are based on prices as of May, 1968. Thus New York has complied with Section 602(a)(23).

The two injunctions are vacated and the decision granting summary judgment for appellees is reversed. The order of the three-judge court dissolving itself is affirmed.

LUMBARD, *Chief Judge* (concurring):

I concur in the result.

While I agree with much of Judge Hays' opinion our differences on some issues necessitate this separate statement.

I rest my concurrence on the ground that the district court abused its discretion in rendering judgment on the pendent claim.

The district court, in my view, did have pendent jurisdiction over the statutory claim in the sense of judicial power. The Supreme Court has held that power exists "in the federal courts" to decide a pendent claim when, (1) it is joined to a constitutional claim which is not insubstantial, and, (2) the nature of the pendent and constitutional claims are such that the plaintiff "would

ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Both of these tests are satisfied in this case.

The fact that the three-judge court declared the constitutional claim moot and thereupon dissolved itself, referring the proceedings back to the single judge district court, did not deprive the district court of pendent jurisdiction. Pendent jurisdiction, in the sense of judicial power, attaches at the outset of a suit. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 727 (1966). The subsequent dismissal of the constitutional claim, Gibbs makes clear, does not deprive the federal courts of all power over a properly joined pendent claim. What it does do is to mandate a reassessment by the three-judge court, or by the single district judge upon referral by the court, of the propriety of proceeding further on the pendent claim. The question becomes one of discretion, and not of judicial power in the strict sense. See *id.* at 726-27.

I know of no authority which prohibits a three-judge court, after it has disposed of a constitutional claim, from referring any remaining pendent claims to a single judge for appropriate disposition. A flat prohibition on such references does not recommend itself from the standpoint of judicial convenience and economy, for often a single judge will be able to dispose of the pendent claims more expeditiously than the cumbersome three-judge court machinery. Of course, the three-judge court might well have dismissed the pendent claim, but, for reasons which are not stated, it did not do so.

In any event, the propriety of the single judge's decision concerning whether or not to proceed to judgment on a pendent claim is subject to review for abuse of discretion, and that is the issue I find squarely presented in this case.

There is force to Judge Hays' suggestion that one factor relevant to the exercise of the district court's discretion is the nature of the remedy sought by plaintiffs. Here the remedy was extreme: an injunction against the operation of a welfare program under a state statute. Congress established the three-judge court mechanism to insure that a state statute would not be enjoined on constitutional grounds simply on the decision of a single judge. While a three-judge court is not required when an injunction is sought on statutory grounds, as here, nonetheless the extreme nature of the injunctive remedy against the state weighs heavily against the adjudication of a pendent claim by a single district judge. This is particularly true in a case such as this, where the constitutional claim had been dismissed well before a decision on the merits, and thus there had not been a substantial investment of federal judicial resources in the case as a whole at the time of the reference of the pendent claim to the single judge. Cf. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966), holding that pendent state claims should be dismissed if the constitutional claim is dismissed before trial.

It is true that the pendent claim in this case is founded upon federal law, thus making the exercise of jurisdiction by a federal court less objectionable than if the claim arose under state law. But here, as Judge Hays points out, the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts. The two issues upon a resolution of which this claim turns—the practical effect of §131-a and the proper construction of §602(a)(23) of the Social Security Act—both are exceedingly complex. The briefs and arguments of the parties, and the varying judicial views they have elicited, have demonstrated the wisdom of allowing HEW, with its expertise in the operation of the AFDC program

and its experience in reviewing the very technical provisions of state welfare laws, an initial opportunity to consider whether or not §131-a is in compliance with §602(a)(23).[1] This is HEW's responsibility under the Social Security Act, see 42 U.S.C.A. §1316 (Supp. 1969). I believe that the district court should have declined to exercise its jurisdiction, thus permitting HEW to determine the statutory claim asserted by plaintiffs, for the Department already had initiated review proceedings concerning §131-a. The Department's determination, it should be noted, will be reviewable in the courts at the instance of either the state, under 42 U.S.C. §1316(a)(3) (Supp. 1969), or the plaintiffs under the Administrative Procedure Act.

While I agree with Judge Hays' treatment of the jurisdictional issue raised under 28 U.S.C. §1331, we differ somewhat with respect to the application of 28 U.S.C. §1343(3) and (4). I do not find that the plaintiffs' claim under §602(a)(23) involves the redress of either "equal rights" or a "civil right" as those terms are used in §1343. I do not believe that the claim, although one founded on a federal right, falls within the ambit of 28 U.S.C. §1983, for it lacks the constitutional overtones that have been present in all the welfare cases cited by the plaintiffs which have been sustained under that section. But even if a broad reading of §1983 is accepted it cannot change the nature of the plaintiffs' claim for the purposes of §1343. On its face it is clear that §602(a)(23) has nothing to do with "equal rights," and it also cannot be said to involve a "civil right" in view of the circumstances which gave

---

1 In *King* v. *Smith*, 392 U.S. 309 (1968), a case much relied on by plaintiffs, HEW had already given notice to the state that its regulation did not conform to the requirements of federal law. 392 U.S. 326 n. 23. Thus the challenge to the regulation made in the *King* suit was ripe for resolution by the courts.

rise to the enactment of §1343(4) in 1957. See U.S. Code Cong. & Adm. News, 85th Cong. (1957), pp. 1966, 1976, H.R. Rep. No. 291.

Since I do not feel that the federal courts are the appropriate forum for the initial resolution of plaintiffs' statutory claim, I do not reach the merits of that claim. At the same time, I should add that Judge Feinberg's view of the merits does not persuade me.

FEINBERG, *Circuit Judge* (dissenting):

The decision in this case allows the State of New York to receive millions of federally granted dollars and then proceed to ignore the federal law granting them by reducing payments to thousands of welfare recipients already living at a bare subsistence level. This result follows from a restrictive interpretation of the district court's jurisdiction and allowable discretion and of the meaning of the applicable federal statute. I respectfully but emphatically dissent.

Because of the differences in the opinions of my brothers, it is necessary to describe them precisely. As I understand it, they agree that the three-judge court properly dissolved itself. Judge Hays rules that the single judge thereafter had no jurisdiction; Chief Judge Lumbard is of the view that the single judge had the power to decide the case, but agrees with Judge Hays that it was an abuse of discretion to do so. Finally, Judge Hays decides that section 131-a of the New York Social Services Law does not conflict with the 1967 amendment of the Social Security Act referred to as section 602(a)(23). Chief Judge Lumbard does not deal with the merits, although he finds unpersuasive the interpretation of section 602(a)(23) contained in this dissenting opinion. I dissent from the

holdings that the single judge lacked jurisdiction or abused it, and that section 131-a does not conflict with section 602 (a)(23). Discussion of the propriety of dissolution of the three-judge court is deferred to point III below. I turn first to the question of the jurisdiction of Judge Weinstein to grant plaintiffs relief.

I. *Jurisdiction of the single judge.*

On this aspect of the case, the issue is whether the United States District Court for the Eastern District of New York had jurisdiction to determine whether federal funds were about to be spent in a manner that would violate a federal statute. Thus stated, the question begs for resolution in a federal court, rather than in a state forum as appellants contend. Moreover, the formidable intricacies of three-judge court procedure should not be allowed to obscure this basic issue.

The district court judge originally convened a three-judge court on April 24, 1969, plaintiffs' complaint having challenged section 131-a of the New York Social Services Law on two main grounds: first, denial of equal protection of the laws because residents of Nassau County would be discriminated against by new payment schedules below those for residents of New York City, and second, conflict with a federal statute, 42 U.S.C. §602(a)(23). Thereafter, the three-judge court held a hearing. While the issues were before it, the New York State legislature adopted an amendment to section 131-a, which the three-judge court felt rendered the equal protection claim moot. Accordingly, that court dissolved itself on May 12, 1969, and remanded the matter back to the single judge. On May 15, Judge Weinstein issued his opinion and on May 16, his order from which appeal has been taken.

Judge Weinstein's conclusion that he had jurisdiction was based upon two theories: that jurisdiction to decide the federal statutory claim was pendent to the federal constitutional claim and that jurisdiction also existed under 28 U.S.C. §1331. He noted that there might also be independent jurisdiction over the federal statutory claim under 28 U.S.C. §1343(3), but found it unnecessary to decide that question. I agree with the district court judge that pendent jurisdiction existed even though the federal constitutional claim of denial of equal protection had been eliminated from the case. I reach this conclusion by either of two routes.

A. Assume that the jurisdiction exercised over the statutory claim was that of the three-judge court. In *King* v. *Smith*, 392 U.S. 309 (1968), the Supreme Court made clear that when a federal constitutional claim and a federal statutory claim are joined together, the three-judge court has power to decide the latter. In fact, that is what the Supreme Court did, putting aside the constitutional issue. It is true that in footnote 3, the Court said (392 U.S. at 312):

> We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts. See generally Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

However, that referred to a suit brought *only* on the statutory ground, a situation not present in that case or here. Indeed, in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 80-81 (1960), the Court said that a properly convened three-judge court has jurisdiction

"over *all* claims" raised against a state statute. The footnotes in that opinion at pp. 81-82 make clear that the quoted phrase applies not just to claims based upon a federal statute but even to "local questions" arising under a state constitution and to "every question involved, whether of state or federal law." Therefore, if the three-judge court in this case was properly convened, as it said it was, it had the power to decide the statutory claim. It chose not to do so on its theory that the constitutional claim had become moot, stating:

> We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. Cf. *King* v. *Smith*, 392 U.S. 309, 312 n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court.

Thus, it is not clear whether the court thought it could or could not exercise pendent jurisdiction, or whether it was deciding that no judge should exercise that jurisdiction or was leaving the question for the single judge. In any event, the matter was remanded back to the single judge "for such further proceedings as are appropriate." Therefore, Judge Weinstein was left with the possibility that the pendent jurisdiction he said that he exercised was that of the three-judge court passed back to him. Cf. *Landry* v. *Daley*, 288 F. Supp. 194 (N.D. Ill. 1968). If he was exercising that jurisdiction, then under the cases cited above his power to do so was clear, unless the moot-

ness of the constitutional claim prevented him, an issue discussed further below.

B. Assume, however, that because the three-judge court had been dissolved the case must be considered on the theory that the pendent jurisdiction allegedly exercised was only that of the single judge district court. Both the constitutional and statutory claims were in the complaint as originally filed. Judge Weinstein convened the three-judge court to consider both but pointed out that if it should subsequently be determined that a three-judge court was not required, "the single judge's decision, as part of that three-judge court, would become the opinion of the Court." When the complaint was filed, the federal constitutional claim of denial of equal protection of the laws was not frivolous and clearly fell within the jurisdictional language of 28 U.S.C. §1343(3), since it sought to redress the deprivation, under color of a state law, of a right secured by the Constitution. The substantive statutory basis for the action was 42 U.S.C. §1983. Insofar as the constitutional claim is concerned, the only reason for a three-judge court was that plaintiffs sought to enjoin the "enforcement, operation or execution" of a state statute. 28 U.S.C. §2281. That did not change the jurisdictional basis; it was a concomitant of the relief sought. At the time the complaint was filed, Judge Weinstein had sufficient "jurisdiction" over the constitutional claim to grant a temporary restraining order, 28 U.S.C. §2284(3), as indeed he did. It is unnecessary to speculate whether in appropriate circumstances the single judge could have, on the basis of the constitutional claim, granted damages against defendant Wyman in an individual capacity[1] or

1 See, e.g., *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Kletschka* v. *Driver*, —— F. 2d —— (2d Cir., April 22, 1969).

issued a declaratory judgment to plaintiffs if they had limited themselves to the two prayers for declaratory relief in the complaint instead of adding another for injunctive relief as well.[2] In fact, plaintiffs took the position before Judge Weinstein that a three-judge court was not required because, *inter alia,* declaratory relief was sought. While Judge Weinstein thought that the request for injunctive relief made a three-judge court necessary, it is not accurate to say that he had no jurisdiction over any aspect of the constitutional claim when the complaint was filed. If such jurisdiction did exist—and I believe that it did—a closely related statutory claim could also be decided by a single judge under the general principles of pendent jurisdiction, liberally construed in *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).[3] Therefore, Judge Weinstein had pendent jurisdiction over the federal statutory claim at the time the case first came before him. It may even be—although it is not necessary to resolve that

---

2 That the state statute could be held unconstitutional in a declaratory ruling by the single judge seems settled. See ALI Study of the Division of Jurisdiction Between State and Federal Courts 245 (Tent. Draft No. 6, 1968), recommending that such a declaratory judgment require a three-judge court but noting:

> [T]he requirement is here extended to cases seeking only a declaratory judgment, a remedy which was unknown in 1910. Three judges are not now needed in such a case. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154-155 (1963); Flemming v. Nestor, 363 U.S. 603, 606-607 (1960).

And see Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 13-20 (1964).

3 The basic and pendent claims "must derive from a common nucleus of operative fact," 383 U.S. at 725, clearly present in this case, e.g., the level of benefits before and after section 131-a and the relationship between benefits and need. The court has power to hear all of the claims if plaintiffs "would ordinarily be expected to try them all in one judicial proceeding," *id.,* assuredly the case here.

issue—that the judge could have acted upon plaintiffs' suggestion that he decide the statutory issue first and convene the three-judge court later, if necessary. Cf. *Kelly* v. *Illinois Bell Telephone Co.*, 325 F. 2d 148 (7th Cir. 1963); *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir. 1958); but cf. *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960). The judge declined that invitation not because he thought he lacked the power to so rule but because he felt that convening the three-judge court would avoid "costly" delay.

The crucial question on either theory A or B is whether the elimination thereafter of the constitutional claim as moot *necessarily* divested the district court of jurisdiction it already had. In *United Mine Workers* v. *Gibbs, supra*, the Court did say, 383 U.S. at 726:

> Certainly, if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claims should be dismissed as well.

But the Court spoke there in the context of a *federal* against a *state* claim. The point here is that the alternative claim to which pendent jurisdiction attached was not a state claim at all, but a claim based upon a federal statute. Moreover, the dismissal of the constitutional claim here did not occur "before trial" but after Judge Weinstein and the three-judge court had spent days in taking evidence and hearing argument on the motion for an injunction. Indeed, Judge Weinstein issued a preliminary injunction only three days after dissolution of the three-judge court and without any further hearing. Moreover, appellants concede that, in effect, at that point a

full trial had been held.[4] Certainly there have been instances where pendent jurisdiction has been allowed to continue even though the basic federal jurisdictional claim has been denied, see, e.g., *Hurn* v. *Oursler*, 289 U.S. 238 (1933); *United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F. 2d 52, 59-60 (6th Cir.), cert. denied, 359 U.S. 1013 (1959); *Travers* v. *Patton, supra*, 261 F. Supp. at 116; cf. *Murphy* v. *Kodz*, 351 F. 2d 163 (9th Cir. 1965), or mooted. *Hazel Bishop, Inc.* v. *Perfemme, Inc.*, 314 F. 2d 399 (2d Cir. 1963).

The reasons Judge Weinstein gave for retention of jurisdiction were as follows:

> The pendent claim does not involve state law alone, but poses crucial and important questions of federal statutory law. It vitally affects a national program designated to protect the fundamental rights of children to the sustenance and stable family life which will enable them to develop into full members of our society capable of exercising their rights and responsibilities under the United States Constitution and it involves the expenditure of billions of dollars of federal monies. The courts in the federal system are in at least as good a position as state courts to adjudicate this question of federal law. Nor can this be described as a petty or unimportant controversy of the kind Congress sought to exclude from the federal courts.
>
> • • • • •

---

4 See Appellants' Application for a Stay of Further Proceedings in the District Court, June 13, 1969, at 2:

> The extraordinarily broad nature of the preliminary injunction in this case and the opinion of the Court below which supported it is such that every real issue in the case had been decided by the District Court and is presently before this Court.

> A speedy determination of this litigation is highly desirable. From the point of view of the plaintiffs, an unnecessary reduction of their benefits may reduce their income below subsistence level, causing grievous harm. From the state's vantage point, an unnecessary extension of any temporary restraining order preventing institution of the new reduced benefits would, according to the testimony of a Deputy Commissioner in the State Department of Social Services, result in a loss to the state of up to ten million dollars a month. Dismissal, under the abstention doctrine, would require plaintiffs to commence a new suit in the state courts. Resulting loss of time would make it impossible to decide the issues before administrative arrangements must be made to implement the new state statute by its effective date—July 1, 1969.
>
> Furthermore, the parties have already presented substantial testimony, affidavits and briefs to the Court. The expenditure of time by the litigants and the Court would be, to a large extent, wasted were all these materials to be offered anew in a state court.

These were compelling considerations. Whether pendent jurisdiction exists depends in part upon the same reasons which justify its exercise. On these facts, jurisdiction was justified by the saving of judicial time once the case had gone as far as it had, by concern for fairness to the litigants, and by the appropriateness of having a *federal* court decide the issue whether congressional conditions to receipt of *federal* funds are met. See Note, *UMW* v. *Gibbs* and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 664-71 (1968). It should also be noted that a three-judge court in Texas, faced with a similar issue, has apparently just ruled for plaintiffs in that action on the basis of the same federal statute

involved here, while also denying various federal constitutional claims. *Jefferson* v. *Hackney*, Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969) (opinion to follow judgment).

Various other arguments regarding the exercise of discretion by the district court remain to be answered. The contention is made that the pendency of an administrative proceeding by the Secretary of Health, Education and Welfare made the district court action "premature" or inappropriate. That "proceeding" was apparently pending in April, and we are not favored with any indication of HEW action other than its request to New York State for further information. The delays inherent in HEW review and the difficulty of obtaining effective exercise by HEW of any sanction were obvious in *King* v. *Smith*, 392 U.S. 309, 326 n. 23 (1968), in which the Court professed no qualms over deciding the issue of construction of the Social Security Act then before it, although HEW had not acted definitively. Cf. *Damico* v. *California*, 389 U.S. 416 (1967); Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 91-92 (1967). In view of the overpowering justification for Judge Weinstein's exercise of discretion to decide the statutory issue, I would not regard the speculative possibility of HEW action as a ground for reversal. If plaintiffs are correct on the merits, as I believe them to be, they will continue to suffer severe and possibly irreparable injury for an indeterminate length of time while HEW studies the problem and negotiates with the state. At the very least, therefore, even under the point of view of the majority, the court should exercise its jurisdiction to the extent of enjoining the operation of the New York statute pending completion of HEW proceedings.

Nor do I agree with the suggestion that the action of the district court was improper because it in effect ordered the state to appropriate additional funds. The district court's holding merely establishes that New York must meet the federal conditions requisite to participation in the federal program or cease its participation. Such a ruling is neither improper nor unprecedented. Thus, a number of courts have recently determined that state maximums on the amount of aid to AFDC families were invalid as violating the equal protection clause or the Social Security Act or both. In at least two of these cases the courts took pains to point out that they were not affirmatively ordering the respective states to appropriate additional funds but only holding that if the states had appropriated insufficient funds to meet the total need they could not "correct the imbalance" by applying the invalid maximums. *Dews* v. *Henry*, 297 F. Supp. 587, 592 (D. Ariz. 1969); *Williams* v. *Dandridge*, 297 F. Supp. 450, 459 (D. Md. 1968); cf. *Westberry* v. *Fisher*, 297 F. Supp. 1109, 1116 (D. Maine 1969). The majority opinion distinguishes *King* v. *Smith*, *supra*, because it "did not have the effect of requiring the state legislature to appropriate additional funds." It is true that the Court there emphasized the latitude of a state in setting "its own standard of need and . . . level of benefits," 392 U.S. at 318, but the effect of section 602(a)(23) was not involved in that case. Moreover, I do not believe that either *King* v. *Smith* or *Shapiro* v. *Thompson*, 37 U.S. L.W. 4333 (U.S. April 21, 1969), which deals with residency requirements, would have been decided differently even if it had been assumed—and the assumption seems logical—that the rulings would increase the expense to a state. In the latter decision, the Court noted that "appellants must do more than show that denying welfare benefits to new

residents saves money. The saving of welfare costs cannot be an independent ground for an invidious classification." *Id.* at 4337 (footnote omitted). In any event, were it necessary, we could follow the example of the three-judge court judgment in *Jefferson* v. *Hackney*, discussed above, which stayed the injunction of the invalid Texas statute for 60 days in order to give the state an opportunity to implement a plan conforming to the requirements of the federal statute. While it may be likely that New York would in fact decide to appropriate additional funds rather than to take some other course of action, that probability is not equivalent to the judicial usurpation of state legislative functions.

Finally, the point is made that a single judge somehow abuses his discretion by enjoining a state statute on the ground that it conflicts with a federal statute. If all that is meant is that it would have been better for three judges rather than one to have ruled on the statutory claim in this case, I agree. The three-judge court had that claim before it and should have decided it rather than dissolving. See point III below. However, if the point is that the single judge in granting injunctive relief thereafter abused his discretion merely because he was a single judge, I disagree. Congress has made the decision not to *require* three judges when the claim for injunctive relief is based on a federal statute rather than on the Constitution. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965). Whatever may be the merits of a contrary point of view—see Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 55-64 (1964)—the change should now come from Congress.

Thus, I conclude that Judge Weinstein had pendent jurisdiction over the statutory claim whether that jurisdiction be of the three-judge court or a single judge court.

Jurisdiction was not lost because the constitutional claim became moot. The judge did not abuse his discretion by deciding the statutory claim on the merits. On this theory, it is not necessary to decide whether, as appellees contend, there would be jurisdiction under 28 U.S.C. §1343(3) or (4) over a case brought on the statutory claim alone. See Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 111-15 (1967). Finally, it is equally unnecessary to decide whether Judge Weinstein was correct in holding that there was jurisdiction under 28 U.S.C. §1331.

Under the rulings of my brothers, the procedural labyrinth of the three-judge court has swallowed up a substantial claim that thousands of AFDC recipients in New York State will be greatly harmed by the violation of a federal statute. The United States District Court for the Eastern District of New York originally had jurisdiction over that claim. Thereafter, the three-judge court was properly convened, according to its own statement, and continued to have that jurisdiction. That court never denied that it could exercise such jurisdiction and did not reject it. Yet, the jurisdiction which both the single judge court and then the three-judge court had has now somehow magically disappeared or is inappropriate for exercise. I dissent from this grudging assessment of the jurisdiction and discretion of the district court.

II. *Legality of section 131-a.*

Since Judge Hays not only holds that the district court lacked jurisdiction to determine the substantive issues raised in the case before us, but also expresses his views on the merits, I will set forth my reasons for dissenting on that issue as well. This requires an analysis of the

interaction of the federal statute, section 602(a)(23), and the New York statute, section 131-a.

Basic to analysis of the fundamental clash between the two statutes is an understanding of how the program of Federal Aid to Families with Dependent Children (AFDC) operates. The AFDC program is over 30 years old and no state is required to participate in it. But all do and receive payments from the federal government in varying amounts on a matching fund basis. Thus, in New York, 50 per cent of all funds paid to "needy dependent children and the parents or relations with whom they are living," 42 U.S.C. §601, is provided by the federal government. Clearly, then, there is an overwhelming federal interest in the administration of the AFDC program in New York, since the state and the federal government pay for it equally.[5] While administration of the AFDC program is left to the individual states, each state's plan for payments must be approved by the federal government and must meet the requirements of the Social Security Act, 42 U.S.C. §602.

To take advantage of federal AFDC payments, each state must set forth a standard of need and provide a level of benefits based upon this standard. 45 C.F.R. §233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). The standard of need is determined by adding together the cost of those items deemed necessary for subsistence. As might be expected, both the standard of need and the benefits actually paid vary in content and amount. As to the former, judgments vary in the several states as to what items are necessary for subsistence and what they cost. As to the latter, some states pay 100 per cent of what is defined

---

5 Actually, the state's direct monetary interest is even smaller, as local governments provide a substantial portion of the non-federal funds.

as the standard of need,[6] while others pay an amount which is less than the standard of need, either by fixing benefits at a percentage of that standard, or by imposing a flat maximum on the amount of benefits to a family. New York has paid 100 per cent of the standard of need, as it defines it, and still purports to follow that course.

It is against this background that we must assess the effect of congressional enactment in 1967 of section 602(a)(23), which requires of each state's AFDC plan that it:

> provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

The critical flaw in appellants' arguments is that they unavoidably require accepting the proposition that in enacting section 602(a)(23) Congress was engaging in a virtually meaningless exercise of ineffectual verbiage. Simply stated, under the proffered interpretation of this legislation, if at some time between January 2, 1968, the date the section became law, and July 1, 1969, a state has complied with the statute's direction that

> the amount used by the State to determine the needs of individuals will have been adjusted to reflect fully

---

6 In determining the amount of aid to be paid to a particular individual or family the state may, of course, take into consideration other income or resources of the recipient. See 42 U.S.C. §602(a)(7), (8).

> changes in living costs . . . and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted

the state has at once fully satisfied the congressional requirement and is thereafter free promptly to nullify the adjustment and reduce its AFDC payments back to their original levels or, as in the case of New York State, to substantially lower levels. This hypothesis, inherent in appellants' position, makes a mockery of congressional purpose.

It may be useful to summarize just what the State of New York has done. In August 1968, the Department of Social Services, pursuant to its usual practice, adjusted its standard of need to reflect the rise in the cost of living as determined by a survey it had previously conducted. Even if this initial increase was sufficient "to reflect fully" cost of living changes, however, any attempt at compliance with section 602(a)(23) was vitiated by the passage thereafter of section 131-a of the New York Social Services Law. That section not only wipes out the modest increases of August 1968, but effects additional and very substantial reductions in welfare benefits to the great majority of AFDC recipients. First, the amounts of the regular, recurring payments to families of specific sizes for their fundamental needs are no longer related to the actual age of the oldest child in each family but are standardized sums based on a mean age of the oldest child in all recipient families of that size, an adjustment which results in sharp reductions in regular grants to many families with older children. In addition, "flat grants" to cover major expenditures for clothing and home furnishings are substantially abolished and almost all previously existing "special grants" to cover extraordinary individual needs such as

medically-dictated special diets, maternity expenses, homemaker services, and the like are eliminated.

The district judge concluded that the actual impact of these changes was "substantial." For example, he found that the new law was "a subterfuge to enact drastic cuts in both the standard of need and level of payment"; that in New York City the net effect of the law will result in increases in assistance to 245 families and decreases to approximately 173,900 families; and that "the decrease in total AFDC payments under the New York State program is no less than $75,000,000" annually. On the evidence before the district court, these findings were justified and were surely not "clearly erroneous." Indeed, my brothers do not challenge them. While appellants originally took the position before us that there was no real reduction in the standard of need, no amount of linguistic acrobatics or technical rationalizations can disguise the glaring fact that the state is critically reducing AFDC standard of need and payments. The crucial question is whether doing so violates a congressional directive contained in section 602(a)(23).

Before consideration of that issue it is helpful again to focus on the basic concepts here involved. There are a number of hypothetical ways for a state to affect welfare payments. It can raise or reduce its standard of need, concluding that a greater or lesser sum is sufficient for subsistence. Whether it pays as benefits 100 per cent, or some lesser percentage, of that standard of need, a change in the standard changes the actual payments. A state can also keep its standard of need constant, but change the percentage of that standard which it will pay. Or a state can leave both its standard of need and level of benefits intact in theory, but impose a flat dollar maximum on the amount

going to any one family or adjust the amount of an existing maximum. Section 602(a)(23) refers to changes in "amounts used . . . to determine . . . needs" or in "maximums . . . on the amount of aid paid"; it does not specifically refer to a change in the percentage of the standard of need that a state pays.

I come now to the question of what section 602(a)(23) was designed to accomplish. The language clearly calls for an increase in standards of need and in dollar maximums to take account of an increase in the cost of living of which Congress, like the rest of us, was clearly aware. Ordinarily, an increase in either would cause an increase in money benefits paid out by the state. However, this effect could immediately be negated by any of the devices described above, i.e., by then reducing the standard of need after having increased it, or by reducing the percentage of benefits paid, or by reducing dollar maximums. New York has utilized the first technique and appellants would attribute to Congress the intention of requiring an increase in the standard of need but not caring whether it is thereafter promptly reduced. Even the brief of the United States Department of Health, Education and Welfare, relied on in footnote 6 of the opinion of Judge Hays, appears to balk at such outright nullification of section 602(a)(23).[7]

---

7 Thus, the brief notes:

> If a State last priced its assistance standard several years ago, and now is simplifying its standard as well as repricing it, question may arise whether the content of the new standard is equivalent to that of the old, and whether the elimination of items or the combination of items in the standard results in a contraction in the content of the standard that offsets in whole or in part the adjustment of prices to reflect changes in living cost. The second sentence of the regulation seeks to foreclose this possibility

Appellants' position attributes to Congress an intention to appear as though it were accomplishing a result which it knew was not being achieved. I am reluctant to presume that to be the case. The language of section 602(a)(23) means *something*, it certainly calls for an increase in standard of need, thereby suggesting an increase in benefits, and I do not see why it also simultaneously suggests its own nullification. The legislative history relied on by Judge Hays is inconclusive. It shows that the admi[illegible]n bill originally sought a greater increase in benefi[illegible]uirement that all states pay 100 per cent of need, a[illegible] an annual cost of living adjustment. That something less emerged does not prove that nothing at all was done; if anything, it tends to show the reverse. Appellants argue that Congress could not have enacted even a temporary "floor" on benefits with so little discussion. But undoubtedly such instances have occurred before. While of some weight, the absence of discussion can hardly be controlling. In his opinion granting the preliminary injunction Judge Weinstein painstakingly outlined the progress of section 602(a)(23) through Congress in reaching his determination as to the congressional purpose behind it. He noted that the inadequacy of present welfare payments throughout the states was repeatedly stressed as the motivation for the proposed legislation, and that although additional provisions originally proposed with the section were dropped, the wording of the basic requirements of section 602(a)

---

and to assure that the repricing will apply to at least the same scope of items as the previous pricing before January 2, 1968.

* * * * *

To adjust maximums on the one hand and to reduce them on the other would be an outright nullification of, and failure to comply with, the requirements of section 402(a)(23) [section 602(a)(23)], and would not constitute compliance with that section.

(23), and presumably the purpose behind it, emerged virtually unchanged.[8]

Section 602(a)(23) is now the subject of litigation in a number of courts. Prior to this case, the only other federal judge who has undertaken an analysis of the section concluded that it prevented a cut in benefits. In *Lampton* v. *Bonin*, —— F. Supp. —— (E.D. La. 1969), a three-judge court was convened to determine the validity of a ten per cent reduction in AFDC grants by the Louisiana Department of Welfare, which plaintiff recipients attacked on a number of grounds, among them that the reduction violated section 602(a)(23). In a decision rendered in April 1969, two of the three judges held that the question was premature, since the state had until July 1, 1969 to comply with the statute. —— F. Supp. at ——. In a lengthy dissent, Cassibry, *J.*, did reach the merits of the issue, and concluded that the section prohibited any reduction in benefits even before July 1.

> Congress necessarily intended to maintain at least the status quo by setting a floor below which ADC payments could not be reduced, which is certainly the level of ADC payments on January 2, 1968, the base figure from which the increases required by section 402(a)(23) [section 602(a)(23)] are to be determined. Though this prohibition on reductions is not expressly stated in the statute, it is necessarily implied, for any other conclusion is "plainly at variance with the policy of the legislation as a whole."
>
> • • • • •
>
> ADC payments in all states are predicated upon the need standard; if this standard is increased, as section

---

8 See *Rosado* v. *Wyman*, —— F. Supp. ——, ——-—— (E.D.N.Y. 1969). See also note 9, *infra*.

402(a)(23) requires, the budgetary deficit must also increase accordingly. In those states paying the budgetary deficit in full, as well as in those states that pay only a percentage of the budgetary deficit (or the standard of need), section 402(a)(23) necessarily requires increased ADC grants correspondent to the increase in the standard of need, for a percentage maximum (100 percent or less) kept constant automatically translates increased need into an increased payment. Similarly, in those states imposing an arbitrary dollar maximum on the size of the assistance grant, section 402(a)(23), by requiring that the maximums imposed be adjusted in accordance with the change in the cost of living, insures increased grants for all recipients. Regardless of which system of computing ADC payments the state follows, section 402(a)(23) is therefore designed to effectuate increased ADC recipient grants. The language of the statute could not be any clearer. —— F. Supp. at ——.[9]

More recently, a three-judge court in Texas considered the issue whether a cut in AFDC benefits violated section 602(a)(23). Although the opinion of the court has not yet issued, its judgment has; the latter indicates that the court unanimously concluded that a reduction in benefits violates the federal statute. *Jefferson* v. *Hackney*, Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969).[10]

---

9 The dissenting opinion also carefully analyzed the legislative history of section 602(a)(23) and concluded, as did Judge Weinstein, that though not voluminous the history of the section clearly evinced a congressional intent that state AFDC payments be increased. —— F. Supp. at ——.

10 See also *Williams* v. *Dandridge*, 297 F. Supp. 450, 464 (D. Md., 1968), where the three-judge court noted in dictum:

> As it shows on its face, §213(b) [section 602(a)(23)] was designed to increase benefits to keep pace with increased living costs.

In both cases, the statutory issues were whether Congress intended by section 602(a)(23) to put at least some floor under welfare payments, and whether the state statute ran counter to that intention. In neither instance did the state legislation reduce a standard of need; rather, the mechanism used to lower benefits was primarily a reduction in the percentage of payment applicable to that standard.[11] Even though that legislative device is not mentioned at all in section 602(a)(23), both Judge Cassibry and apparently the Texas court felt that the federal statute prevented indirect as well as direct evasions of congressional intent. In this case, the action of the State of New York is in even sharper conflict with section 602(a)(23) because, according to the trier of fact, New York has done the one thing that the section is undeniably designed to prevent; i.e., the State has directly reduced the standard of need despite the admonition of the section to adjust that standard "to reflect fully changes in living costs." Indeed, New York has reduced the standard—and therefore the benefits paid—to a level below the standard in effect for most recipients before any cost of living adjustment.

I do not suggest that the meaning and effect of section 602(a)(23) are unmistakably clear. But, on balance, I think that its language and the legislative history relied on by Judge Weinstein show that Congress intended AFDC payments throughout the country to be increased somewhat to reflect the rise in the cost of living and that the levels of payments so adjusted were to remain stationary

---

11 Apparently both Louisiana and Texas formerly paid on a basis of 100% of their standards of need, subject to dollar maximums on the amount of aid to any family. After increasing its standards to comply with section 602(a)(23), Texas evidently reduced its percentage payment to 50%; Louisiana merely cut all grants by 10%, including those grants based on dollar maximums. See *Lampton* v. *Bonin*, *supra*, —— F. Supp. at ——, —— & n. 16.

at least pending further congressional action. That this intention was far from unreasonable is sufficiently demonstrated by the fact, supported by ample evidence on the record below, that even in New York State, which has one of the highest levels of AFDC benefits in the United States, AFDC recipients live at or below a bare subsistence level. Accordingly, I conclude that since New York has not complied with section 602(a)(23) properly read, the injunction was justified.

III. *Dissolution of the three-judge court.*

The last issue concerns the appeal from dissolution of the three-judge court. I think that there is a very substantial question as to whether the court was correct in holding that the amendment to section 131-a rendered plaintiffs' constitutional claim either "moot" or "unripe." Plaintiffs very persuasively argue that the only effect of the amendment was to grant purely discretionary administrative power to increase the level of Nassau County payments and that the mere possibility that such discretion might be exercised to cure an allegedly prohibited discrimination is far from sufficient to void the constitutional issue. Nor is it at all clear that the subsequent increase of the Nassau County payment schedules retrospectively corroborates the dissolution of the three-judge court, since plaintiffs assert—and defendants do not deny—that the increase still fails to bring Nassau County levels of payment up to those in New York City. Cf. the recent convening of a three-judge court in *Rothstein* v. *Wyman*, No. 69 Civ. 2763 (S.D.N.Y., July 7, 1969).

Moreover, my view is that the three-judge court should have decided the statutory question which concededly remained in the case before it. All of the reasons referred to

in Part I of this opinion for the exercise of pendent jurisdiction by Judge Weinstein alone applied to the three-judge court. In addition, dissolution of the court allowed the argument to be made—and to be accepted—that the jurisdiction of the three-judge court had disappeared. It would have been quicker, simpler and more appropriate to the kind of pressing issues before that court if it had exercised its power to the fullest.

If I thought that the dissolution of the three-judge court completely divested Judge Weinstein of all jurisdiction then I would regard the decision to dissolve as an abuse of discretion and would dissent on that ground too. However, as Part I, *supra*, indicates, I do not attach that consequence to dissolution and, accordingly, need not go that far.

APPENDIX I

Order of the United States Court of Appeals for the Second Circuit Denying Application for Stay of Mandate Pending Application for Stay to Mr. Justice Harlan

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of July, one thousand nine hundred and 69

JULIA ROSADO, *et al.*,

Plaintiffs-Appellees,

v.

GEORGE K. WYMAN, individually and in his capacity as COMMISSIONER OF SOCIAL SERVICES FOR THE STATE OF NEW YORK, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Defendants-Appellants,

(and 2 other cases).

IT IS HEREBY ORDERED that the motion made herein by counsel for the appellees by notice of motion dated July 18,

1969 to stay issuance of the mandate pending consideration of an application for a stay to Mr. Justice Harlan be and it hereby is denied.

/s/ J. Edward Lumbard

/s/ Paul R. Hays

I dissent Wilfred Feinberg

Circuit Judges